Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

KENNETH SCOTT NIVENS,
GLEN LANCE MANERS,
TERRI LYNN STORK,

Petitioners,

v.

PETER S. GILCHRIST, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1997 North Carolina's highest court rejected a claim that an excise tax on the possession of unauthorized substances by drug dealers is a criminal penalty subject to procedural safeguards and democratic constraints guaranteed by the U.S. Constitution. In 1998, the Fourth Circuit respectfully disagreed and held that the drug tax is a criminal penalty that triggers these constitutional rights. In 2000, the Fourth Circuit held that habeas relief was not available because North Carolina's view of the drug tax was reasonable, albeit incorrect. The question presented is whether a colorable double jeopardy claim is an extraordinary circumstance justifying federal court intervention pursuant to the Civil Rights Act of 1864 in a state prosecution to the extent necessary to determine the merits of the federal double jeopardy claim where the state's highest court has already taken the position that the drug tax is not a criminal penalty and the claimants facing trial have paid the drug tax?

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Nivens, Maners, and Stork respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 319 F.3d 151 (4th Cir. 2003). The opinion of the district court (App., *infra*, 25a-34a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 11, 2003. A petition for rehearing was denied on March 11, 2003 (App., *infra*, 35a-36a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth in the appendix. App., *infra*, 37a-49a.

STATEMENT OF THE CASE

1. The *Younger* abstention doctrine allows the federal court to abstain from intervening in a state proceeding, except under extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37 (1971). The federal court takes into consideration equity, comity, and federalism in determining whether abstention is advisable. *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983).

Under federal circuit law, the court's decision to abstain is reviewed for abuse of discretion. *Martin Marietta Corp. v. Md. Comm'n on Human Rel.*, 38 F.3d 1392, 1396 (4th Cir. 1994). Under federal circuit law, abstention is appropriate where the availability of a remedy in the state proceeding depends on the state's highest court reversing itself. *Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986). *See also Duty Fee Shop v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1183 (1st Cir. 1989); *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 224 (9th Cir. 1994); *Hansel v. Town Court of Springfield, N.Y.*, 56 F.3d 391, 394 (2d Cir. 1995).

In *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc), the court of appeals held that a state defendant's double jeopardy claim "is an extraordinary circumstance warranting federal court equitable intervention" in the state criminal proceeding. *Id.* at 904. The state trial court had declared a mistrial and had begun retrial when the federal appellate court ordered a stay to consider whether the second trial violated the federal double jeopardy right. The federal court of appeals stated that a colorable double jeopardy claim was a "preeminent example of one of the very few extraordinary circumstances justifying federal court intervention in a pending state criminal proceedings." *Ibid.*

2. On July 8, 2000, Nivens, Maners, and Stork were arrested and ecstasy pills seized. The North Carolina Department of Revenue assessed drug taxes on the ecstasy possessed by Nivens, Maners, and Stork and obtained a judgment against them. The tax lien was promptly satisfied. The State then indicted Nivens, Maners, and Stork for various offenses related to the possession of the ecstasy that was taxed.

Nivens, Maners, and Stork filed a federal lawsuit under the Civil Rights Act of 1864 seeking to enforce their federal constitutional right against double jeopardy by means of a preliminary and permanent injunction prohibiting the state prosecutor from prosecuting them and all similarly situated individuals. They alleged in their complaint that extraordinary circumstances existed in that there is a conflict between federal and state law as to the North Carolina drug tax.

Under North Carolina law, the North Carolina drug tax is not a criminal penalty. *See State v. Crenshaw*, 144 N.C. App. 574 (2001); *State v. Manning*, 139 N.C. App. 454 (2000); *State v. Wambach*, 136 N.C. App. 842, *review denied*, 353 N.C. 273, *aff'd*, 353 N.C. 449 (2000); *State v. Woods*, 136 N.C. App. 386, *review denied*, 351 N.C. 370 (2000); *Milligan v. State*, 135 N.C. App. 781 (1999), *review denied*, 351 N.C. 358, *cert. denied*, 531 U.S. 819 (2000); *State v. Adams*, 132 N.C. App. 819, *review denied*, 350 N.C. 836, *cert. denied*, 528 U.S. 1022 (1999); *State v. Creason*, 123 N.C. App. 495 (1996), *aff'd per curiam*, 346 N.C. 165 (1997); *State v. Ballenger*, 123 N.C. App. 179 (1996), *aff'd per curiam*, 345 N.C. 626, *cert. denied*, 522 U.S. 817 (1997); *State v. Morgan*, 118 N.C. App. 461 (1995). Changes to the drug statute are not analyzed in state court because of binding precedent from the state's highest court holding that the original drug tax was not a criminal penalty. *See, e.g., State v. Crenshaw, supra.*

Under federal law, the North Carolina drug tax is a criminal penalty. *See Vick v. Williams*, 233 F.3d 213, 219 n.4 (4th Cir. 2000) (1996 drug tax assessment) ("the continuing validity of our decision in *Lynn v. West* is not called into question by our decision today."); *United States v. Johnson*, 37 Fed. Appx. 599, 2002 WL 384134 (4th Cir. 2002)

(unpublished) (1997 drug tax assessment); *United States v. Anderson*, 215 F.3d 1321, 2000 WL 620308 (4th Cir. 2000) (table) (1996 conviction); *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998). *Lynn v. West* rejected the conclusions of the state's highest court based upon an analysis of the drug tax under this Court's precedent in *United States v. Hudson* and concluded that "although nominally labeled an 'excise tax,' the Drug Tax is enforced only against those arrested for drug crimes, and – unlike routine license and excise taxes – payment of the tax confers no legal privilege to possess or sell." *Lynn*, *supra*, at 592 n.10. The amended tax rate and other adjustments to the tax statute do not alter the essential character of the drug tax.

The Fourth Circuit does not afford state defendants a federal habeas remedy with regard to the drug tax issue once state remedies have been exhausted because the state view of the drug tax is reasonable. *Vick v. Williams*, 233 F.3d 213 (4th Cir. 2000).

In the instant case, the district court granted the respondent's motion to dismiss under the *Younger* abstention doctrine. The district court reasoned that the plaintiffs' double jeopardy claim did not involve extraordinary circumstances because the plaintiffs had not yet suffered a criminal trial, double jeopardy had not yet attached because a jury had not yet been sworn, and the tax assessment was not a prosecution.

3. The court of appeals affirmed. The court of appeals declined to reach the double jeopardy claim. The court of appeals also declined to resolve the issue of whether abstention is appropriate after Nivens, Maners, and Stork exhaust their state remedies.

The court of appeals held that a colorable double jeopardy claim is not an extraordinary circumstance exception to the *Younger* abstention doctrine and that the likelihood of success of the claim is the appropriate focus of the inquiry. The court of appeals applied a balancing test similar to that used to determine whether to grant a temporary stay and preliminary injunction pending resolution of the merits of a case. The court of appeals stated that there was a substantial likelihood that the petitioners' prosecution was not a violation of double jeopardy because of a 1995 amendment that reduced the tax rate and because the tax assessment was part of the pending proceeding and thus not a prior proceeding implicating double jeopardy and did not involve a prior trial.

The court of appeals stated that the petitioner's reliance on *Gilliam v. Foster* for the proposition that a colorable double jeopardy claim is an extraordinary circumstance was misplaced. The court emphasized that in *Gilliam* there was a state trial followed by an attempt at a second state trial. The court explained that the likelihood of success standard it applied in *Gilliam* to decide whether a temporary stay was appropriate was the approach prescribed in *Younger* in determining whether to abstain.

REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that the district court has discretion to abstain from asserting jurisdiction granted under the Civil Rights Act of 1864 for persons who have raised a colorable sanctions-variety double jeopardy claim that will be summarily rejected in the state criminal proceeding due to binding precedent from the state's highest court. That holding conflicts with decisions in other circuits. The Fourth Circuit's decision is also incorrect. The *Younger* abstention doctrine is a legal standard for evaluating equity, comity, and federalism that is subject to *de novo* review rather than a matter of discretion. Contrary to the court of appeal's view, the doctrine cannot serve to bind federal courts to state precedents nor eliminate a federal statutory remedy for colorable claims of sanction-variety double jeopardy claims. Forcing a trial upon the previously sanctioned petitioners, state court, jurors, witnesses, and prosecutor, before addressing the merits of the double jeopardy claim, would be inefficient. Forcing the previously sanctioned petitioners to take their case through the state system, ultimately petition the state's highest court and then this Court, and have no federal habeas remedy because the state's interpretation of the federal double jeopardy right is reasonable albeit in error denies the petitioners their rights that Congress sought to protect under the Civil Rights Act and that federalism was designed to safeguard. Review by this Court is therefore warranted.

A. The Fourth Circuit's Decision Conflicts with Decisions of Other Circuits.

The Fourth Circuit takes an expansive view of the *Younger* abstention doctrine that is in conflict with other circuits in two ways. First, it is deferential to the district court, reviewing the decision whether to abstain for abuse of discretion. Second, it binds the federal court to state court precedent and eliminates a federal statutory remedy for the sanction-variety of double jeopardy claim, by requiring the claimant to take the claim through the state system and ultimately petition the state's highest court to exercise discretionary review and reverse itself and this Court for discretionary review.

Other circuits apply a *de novo* standard of review. *See Canatella v. State of California*, 304 F.3d 843, 850 (9th Cir. 2001); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001); *Associated General Contractos of Ohio, Inc. v. Drabik*, 214 F.3d 730, 739 (6th Cir. 2000); *Schlager v. Phillips*, 166 F.3d 439, 441 (2d Cir. 1999); *Brooks v. New Hampshire*, 80 F.3d 633, 637 (1st Cir. 1996). *See also Riley v. Simmons*, 45 F.3d 764, 770 (3d Cir. 1995) (district court's analysis is subject to *de novo* review).

In other circuits, abstention is not appropriate where binding state precedent makes submitting the federal rights to a state forum futile. *W.P. v. Poritz*, 931 F. Supp. 1187, 1197 (D.N.J. 1996); *Bongiorno v. Lalomia*, 851 F. Supp. 606, 613 (D.N.J.), *aff'd without opinion*, 39 F.3d 1168 (3d Cir. 1994); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1289-90 (W.D. Tenn. 1983); *Mastin v. Fellerhoff*, 526 F. Supp. 969, 971 (S.D. Ohio 1981); *McKinstry v. Genesee County Circuit*, 669 F. Supp. 801, 805-06 (E.D. Mich. 1987).

B. The Court of Appeal's Decision Is Incorrect.

The court of appeal's decision conflicts with this Court's most recent sanctions-variety double jeopardy case. In *Hudson v. United States*, 522 U.S. 93, 95 (1997), an "administratively imposed" sanction followed by indictment "for essentially the same conduct" raised a colorable double jeopardy claim that was determined before trial on the indicted charges. An "administratively imposed" sanction followed by indictment "for essentially the same conduct" raises a colorable double jeopardy claim that should be determined before trial on the indicted charges. *Hudson v. United States*, *supra*, at 95 (interlocutory appeal before trial). Under *Hudson*, jeopardy attached when the sanction was imposed, thereby giving rise to the question of whether the sanction was a criminal penalty that shielded the defendant from the subsequent prosecution. *See also Ex parte Lange*, 85 U.S. 163, 176, 178-79 (1873) (payment of the fine precluded imposition of prison term). The lack of any trial concerning the sanction was irrelevant.

Once the state's highest court has staked out its position on the issue, "there is no further bar to the assumption of federal jurisdiction, for the deference owed to the state judicial system demanded by the principles of comity and federalism has been paid." *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979). This Court in *Younger v. Harris* was not faced with a prior decision by the state's highest court and did not look to the likelihood of success on the merits of the federal constitutional claim in determining whether to abstain from considering the merits of the claim. 401 U.S. 37 (1971). The inquiry, instead, is into the status of the issue under state law so as to accord the state the opportunity to interpret its own statute under the federal law at issue. In the instant case,

that inquiry shows that the state has been afford the opportunity to interpret its drug tax and has staked out its position on the federal double jeopardy claim. The interests of comity and federalism have been satisfied.

The court of appeal's conclusions as to the amended drug tax rest primarily on the tax rate and secondarily on the belief that the amended drug tax is neither conditioned on a criminal offense nor evidence of guilt in a subsequent prosecution. The tax rate was a significant factor under *United States v. Halper*, 490 U.S. 435 (1989), but *Halper* was abrogated by this Court in *United States v. Hudson*, 522 U.S. 93, 95 (1997). The court of appeals does not explain how the possession that triggers the drug tax is not also a criminal offense, thereby conditioning the tax on a criminal offense. The court of appeals did not analyze either of the two secondary amendments under the *Kennedy/Ward* factors applied in *Lynn* to the drug tax. There is no case law to support the proposition that excluding from evidence a prior conviction or sanction permits a second conviction for the same offense.

The court of appeals disregarded this Court's reasons in *Hudson v. United States* for overruling the "sanctions actually imposed" method used in *Halper*, namely, that requiring the defendant to "proceed through a trial to judgment" on a civil sanction to find out what the actual sanction is "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even '*attempting* a second time to punish criminally.' " *Hudson v. United States*, 522 U.S. 93, 101-102 (1997) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

C. The Court of Appeal's Decision May Cause Serious Adverse Consequences.

The court of appeal's decision has the potential to create serious adverse consequences. The court has taken the *Younger* abstention doctrine in an unexpected direction that grafts a likelihood of success standard to the doctrine and creates a category of federal constitutional rights – the sanction-variety of double jeopardy claims – for which no federal statutory remedy is available.

The court of appeal's decision disregards this Court's reasons in affirming abstention in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). In *Middlesex* the plaintiff was required to exhaust the state's remedies because the state had adopted a rule allowing interlocutory appeal of federal constitutional claims to the state's highest court. No such rules are in place in North Carolina for the federal double jeopardy claim raised by Nivens, Maners, and Stork. The State of North Carolina does not provide for interlocutory appeal of pre-trial motions raising double jeopardy claims. N.C.G.S. § 15A-1444(a) (defendant can appeal after final judgment is entered); N.C.G.S. § 7A-27(b) (defendant can appeal after final judgment entered); *State v. Shoff*, 118 N.C. App. 724 (1995); *State v. Joseph*, 92 N.C. App. 203 (1988).

The consequence of the court's decision will be to increase the amount of disruption to the state proceeding. Nivens, Maners, and Stork will file their pretrial motion in state court and the state court will summarily reject it. The court acknowledges that state courts have summarily rejected double jeopardy claims in post-amendment cases in the past, which they obviously would since under state law

the drug tax never was a penalty. The state court and prosecutor will be ready to proceed to trial at that time, but Nivens, Maners, and Stork will re-file their § 1983 claim in federal court raising their federal double jeopardy claim once again. Thus, the court of appeals requires the parties to duplicate the process that has interrupted the state criminal proceeding and the parties' lives. This duplicative effort is costly and disruptive of the lives and functions of the parties and serves no purpose. Whatever benefits, if any, from this process would be far outweighed by the costs, including disruption of a state criminal proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED FEBRUARY 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1176

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed February 11, 2003]

Appendix A

Before: WILLIAMS, MOTZ, and KING, Circuit Judges.

WILLIAMS, Circuit Judge:

Appellants Kenneth Scott Nivens, Glen Lance Maners, and Terri Lynn Stork brought an action in the United States District Court for the Western District of North Carolina, pursuant to 42 U.S.C.A. § 1983 (West Supp. 2002) and the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 and 2202 (West 1994), to enjoin the pending state criminal drug prosecutions against them, alleging that their payment of the North Carolina's drug tax was a criminal, not civil, penalty, and thus any criminal punishment imposed in their pending criminal trial will violate the Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The district court abstained from exercising jurisdiction and intervening in the state proceedings based on *Younger v. Harris*, 401 U.S. 37 (1971), which reaffirmed the principle that a federal court "should not act to restrain a [state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. The district court concluded that Appellants had not exhausted their state remedies and that they would not suffer irreparable damage if the state action was not enjoined because Appellants had yet to be subjected to a criminal prosecution. For the reasons that follow, we affirm the district court's decision to abstain.

The underlying facts in this case are not in dispute. On July 8, 2000, Appellants were arrested for various violations of the North Carolina Unauthorized Substances

Act relating to the sale of 1024 ecstasy pills. Shortly thereafter, North Carolina assessed taxes for possession of the drugs, including penalties and interest, totaling $8,677.13,[1] pursuant to North Carolina's Unauthorized Substances Tax Act, N.C. Gen. Stat. §§ 105-113.105, *et seq.* (2000).[2] Within a month or so, Appellants paid the taxes in full and without contest. Subsequently, North Carolina indicted Appellants for possession, sale, delivery, and transportation of, and conspiracy to sell and deliver, an unauthorized substance and scheduled a criminal trial for the November 5, 2001 term of the Superior Court of North Carolina.[3] On October 29, 2001, Appellants filed a motion for a temporary restraining order and a preliminary injunction in the district court to stay their trial. North Carolina voluntarily stayed Appellants' prosecution until January 2002 to allow Appellants adequate time to raise their contentions before the district court, and we issued a stay of the district court's order pending the outcome of this appeal. Because we now affirm the district court's decision to abstain from exercising jurisdiction, we lift our stay.

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1. Appellants Nivens, Maners, and Stork were jointly assessed, respectively, $6,259.67, for the possession of 700 and the sale and possession of 184 pills, and Maners was additionally assessed $1,336.33 for the sale of 184 of these ectasy pills Stork was additionally assessed $1,081.13 for the sale of another 140 ecstasy pills.

2. We refer to the Unauthorized Substances Tax Act, N.C. Gen. Stat. §§ 105-113.105, *et seq.* (2000), as North Carolina's "drug tax" throughout the opinion.

3. Appellants named Peter S. Gilchrist, III, the District Attorney for the Twenty-Sixth Prosecutorial District of North Carolina, as Respondent in his petition. For ease of reference we refer to Gilchrist as "North Carolina" throughout the opinion.

Appendix A

II.

A.

The sole issue on appeal is whether the district court properly abstained from exercising jurisdiction under *Younger*, thus declining to reach Appellants' Fifth Amendment claims under the Double Jeopardy Clause.[4] We review the district court's decision to abstain under Younger for abuse of discretion. *Martin Marietta Corp. v. Md. Comm'n on Human Rel.*, 38 F.3d 1392, 1396 (4th Cir. 1994); *see also Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir. 1997) (noting that an error of law constitutes an abuse of discretion).

Based upon principles of federalism, the Supreme Court in *Younger* articulated the policy of comity underlying the federal courts' obligation to refrain from adjudicating the merits of federal constitutional claims in an underlying state

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4. The Fifth Amendment's Double Jeopardy Clause states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Supreme Court has recognized that the Double Jeopardy Clause protects individuals from being criminally prosecuted more than once for the same offense. *See Monge v. California*, 524 U.S. 721, 727-28 (1998). Protection from subsequent of "successive" criminal prosecutions extends to any party who has already been the subject of a criminal prosecution for the same offense, regardless of the result of the first criminal prosecution. *Id.* at 729. The Court has also concluded that the Double Jeopardy Clause protects individuals from the imposition of "multiple criminal punishments for the same offense," but "only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, 99 (1997).

criminal action: adjudicating such claims needlessly injects federal courts into ongoing state criminal prosecutions, undermines the state's ability to enforce its laws, and does not show "a proper respect for state functions." *Younger*, 401 U.S. at 44. The Court also recognized that federal courts acting as courts of equity in this context "should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. Later, in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the Court held that a federal court should abstain from interfering in a state proceeding, even though it has jurisdiction to reach the merits, if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit. *Id.* at 432; *Martin Marietta Corp.*, 38 F.3d at 1396 (stating the same considerations).

All three of the circumstances identified in the Middlesex inquiry are present here. First, Appellants instituted this lawsuit in an effort to stop, and eventually dismiss, North Carolina's pending criminal proceedings against them. Second, North Carolina has a very important, substantial, and vital interest in preventing violations of its criminal laws. *See Younger*, 401 U.S. at 43-44; *see also Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (noting that "the State's interest in the efficient operation of its criminal justice system" is an "important state interest[]"). Third, as is discussed below, infra at 12-17, Appellants have an adequate opportunity in

the state prosecution to raise the double jeopardy claim advanced in the federal lawsuit, although they assert that it would be futile. The district court, accordingly, did not abuse its discretion in abstaining from hearing Appellants' case, unless the case falls under an exception to the general principle requiring abstention.

B.

The Supreme Court has recognized that in "extraordinary circumstances," federal courts have discretion to disregard the "strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex County Ethics Comm.*, 457 U.S. at 431, 102 S. Ct. 2515. In *Younger*, the Supreme Court explained the exception to this "strong federal policy":

> "[W]hen absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, *except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate.* Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. *The accused should first set up and rely on his defense in the state courts*, even though this involves a challenge of the validity of some statute, *unless it plainly*

appears that this course would not afford adequate protection."

Younger, 401 U.S. at 44, 91 S. Ct. 746 (emphasis added) (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44, 46 S. Ct. 492, 70 L. Ed. 927 (1926)); *see also Kugler v. Helfant*, 421 U.S. 117, 123-24, 95 S. Ct. 1524, 44 L. Ed. 2d 15 (1975) (holding that federal equitable intervention in a state trial may be warranted upon a showing of "bad faith or harassment by state officials," "where the state law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions," or where "other extraordinary circumstances" exist that present the necessary threat of irreparable injury). Thus, a federal court must abstain from interfering with an ongoing state proceeding where a litigant has "an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." *Middlesex*, 457 U.S. at 437, 102 S. Ct. 2515 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973)).

Appellants do not claim that their prosecution was undertaken with the intent to harass or because of any bad faith. Nor do they claim that they have exhausted their avenues for relief in the state court proceeding. *See Huffman v. Pursue Ltd.*, 420 U.S. 592, 608-10 & N. 21, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975) (requiring, for a federal court to assert jurisdiction over federal issues under 42 U.S.C.A. § 1983 in a pending state action, exhaustion of state appellate remedies "unless [the claimant] can bring himself within one of the exceptions specified in *Younger*"). Accordingly, for a

federal court to disregard the mandates of *Younger*, Appellants must show extraordinary circumstances demonstrating that they do not have an adequate remedy at law and the danger of irreparable injury if they are denied equitable relief is both great and immediate. *Younger*, 401 U.S. at 44, 91 S. Ct. 746. As is discussed below, we conclude that Appellants cannot establish either.

C.

1.

Appellants first contend that *Younger* is inapplicable because, they assert, it "plainly appears" that the courts of North Carolina will "not afford" them "adequate protection." *Younger*, 401 U.S. at 44, 91 S. Ct. 746. They concede that they have pretrial avenues in which they can raise their double jeopardy claims in state court, but they argue that because the North Carolina Supreme Court has already decided that North Carolina's pre-1995 amendment drug tax[5] *is not* a criminal penalty, *see State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd*, 481 S.E.2d 84 (N.C. 1997) (*per curiam*), any contrary argument in a North Carolina state court would be futile. Further, Appellants note that this court has determined that North Carolina's pre 1995 amendment

5. Because the General Assembly of North Carolina has amended the drug tax law several times since the courts in *State v. Ballenger*, 345 N.C. 626, 481 S.E.2d 84 (1997), and *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), considered it, *see infra* at 156-157, we refer to the drug tax law in force at the time of *Ballenger* and *Lynn* as the "pre-1995 amendment drug tax" and the drug tax law after the amendments as the "post- amendments drug tax."

drug tax *is* a criminal penalty. *See Lynn v. West*, 134 F.3d 582, 593-94 (4th Cir. 1998). The disagreement between the North Carolina courts and this court, Appellants assert, demonstrates that North Carolina will violate their federal constitutional rights and, thus, will not afford them adequate protection. As discussed below, we conclude that because neither the Fourth Circuit nor the North Carolina Supreme Court has ever analyzed the post-amendments drug tax under which Appellants were assessed their taxes to determine if it is a criminal punishment, Appellants cannot demonstrate that the North Carolina courts will plainly not afford them adequate protection.

The decisions in *Ballenger* and *Lynn* were based on an analysis of *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 783, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In *Kurth Ranch* the United States Supreme Court determined that Montana's tax on illegal drugs was so fundamentally punitive that it was actually a criminal punishment such that an assessment of the drug tax, after a criminal penalty had already been imposed, violated the Double Jeopardy Clause by imposing an unconstitutional second punishment. *Id.* at 783, 114 S. Ct. 1937. Montana characterized its law as civil, but the Court determined that it was actually a "second punishment" for double jeopardy purposes by looking at four features: "(1) the high tax rate, (2) the deterrent purpose of the tax, (3) the fact that the tax was conditioned on the commission of a crime, and (4) the fact that the tax was levied on 'possession of goods that no longer exist and that the taxpayer never lawfully possessed.' "

Lynn, 134 F.3d at 589 (quoting Kurth Ranch, 511 U.S. at 780-84, 114 S. Ct. 1937).[6]

In *Ballenger*, 481 S.E.2d at 84, the North Carolina Supreme Court affirmed, without comment, an appellate court decision holding that North Carolina's pre 1995 amendment drug tax did not have "such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments [under] the Double Jeopardy Clause," *Ballenger*, 472 S.E.2d at 575. The North Carolina appellate court reviewed the pre-1995 amendment drug tax and concluded that it was not as punitive as Montana's drug tax in *Kurth Ranch* and not a criminal penalty because:

> the North Carolina tax becomes payable within forty-eight hours after the taxpayer comes into possession of the substance [and] is not a tax on confiscated goods, as was the case with the Montana tax, which became due only upon the taxpayer's arrest for possession of the substance. To the contrary, the dealer is not required . . . to disclose his or her identity . . . and any information obtained . . . is confidential and cannot be used in a criminal prosecution. . . .

Id. at 575.

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6. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), did not involve the issue of *Younger* abstention because the underlying dispute occurred in a federal bankruptcy proceeding and went to the Supreme Court on direct review from the Ninth Circuit Court of Appeals, *id.* at 773-75, 114 S. Ct. 1937.

Appendix A

After the *Ballenger* decision, we construed the same pre-1995 amendment drug tax and concluded that it was a criminal penalty because:

> the [d]rug [t]ax contains no features that allow us to distinguish *Kurth Ranch*. The rate of taxation is even steeper than the tax in *Kurth Ranch*. Unlike the application of a normal income tax on illegal activity, the [d]rug [t]ax is enforced only against criminals. . . . [T]he [d]rug [t]ax does not contemplate lawful dealings in the product that is the subject of the tax. The [d]rug [t]ax singles out a class of persons who have engaged in criminal activity and subjects the class to a rate of taxation far beyond that faced by any legitimate taxpayer.

Lynn, 134 F.3d at 592.[7]

In 1995, 1997, and again in 1998, before North Carolina assessed the drug tax on Appellants, the General Assembly of North Carolina, partially in response to the Supreme Court's decision in *Kurth Ranch* and our decision in *Lynn*, dramatically altered its drug tax. For example, in 1995, the General Assembly (1) made the drug tax payable upon receipt

7. Although we did address in *Lynn* whether North Carolina's pre-1995 amendment drug tax was a criminal punishment under *Kurth Ranch*, as applied to the individuals in that case, we did not address *Younger* abstention or double jeopardy because *Lynn* involved a federal drug prosecution and a challenge to a subsequent assessment of the state drug tax. *Lynn*, 134, F.3d 582, 583-88 (1998) (determining that North Carolina's pre 1995 amendment drug tax was a criminal penalty that could not be imposed without constitutional safeguards that attach to criminal proceedings).

of drugs rather than upon a criminal violation; (2) lowered the tax on various drugs; (3) repealed the section that made the violation of the drug tax a Class I felony; and (4) lowered the interest and penalty applicable when a dealer fails to pay the tax within 45 days of receiving the drugs from 100% to 50%. *See* N.C. Gen. Stat. §§ 105- 113.106, -113.107, -113.110, 113.110(A) (1994), *amended by* An Act to Revise the Controlled Substance Excise Tax, Ch. 340, H.B. No. 123 (1995). In 1997, the General Assembly included previously unaccounted for substances, such as mash and other illicit beverages. *See* N.C. Gen. Stat. §§ 105-113.106, - 113.107 (1996), *amended by* An Act to Levy an Excise Tax on Illicit Spirituous Liquor, an Excise Tax on Mash, and an Excise Tax on Illicit Mixed Beverages, N.C. Sess. Laws 1997-292 (1997). In 1998, the General Assembly (1) lowered the rate at which it taxed cocaine from $200 per gram to $50 per gram; (2) lowered the rate at which it taxed drugs based on dosage units from $400 per 10 dosage units to $200 per 10 dosage units; and (3) completely abolished the special penalty and interest section and replaced it with the general interest and penalty provisions applicable to all taxes paid in North Carolina, effectively reducing the penalty for late payment from 50% to 10-40%. *See* N.C. Stat. §§ 105-113.107, -113.110A (1997), *amended by* An Act to Amend the Excise Tax on Controlled Substances, N.C. Sess. Laws 1998- 218 (1998). As part of the 1998 amendments, the General Assembly expressly stated:

> Whereas, the intent of the General Assembly in enacting this tax continues to be to raise revenue through a civil tax on this highly profitable activity . . . [and] not to create a criminal penalty . . .

Appendix A

> Whereas, upon . . . challenge in the federal courts, the controlled substance tax was found in 1998 to be a criminal penalty . . . Whereas, it is, therefore, the intent of the North Carolina General Assembly to modify the tax in accordance with [*Lynn*], so that the tax may continue to be assessed in a manner consistent with the law as interpreted [in *Lynn*].

An Act to Amend the Excise Tax on Controlled Substances, N.C. Sess. Laws 1998-218 (1998).

Neither North Carolina's *Ballenger* decision nor our decision in *Lynn* addressed North Carolina's amended drug tax, which is at issue in this case, because both cases involved tax assessments before 1995.[8] In fact, no court[9] has

8. Although our decision in *Lynn* cites to the 1996 version of North Carolina's drug tax, we clearly interpreted North Carolina's pre-1995 amendment drug tax. *See, e.g., Lynn*, 134 F.3d at 590 (discussing the 100% penalty applicable to late payments of the drug tax). As stated in the text, the General Assembly of North Carolina modified the penalty provision for late payment in 1995 from a 100% to a 50% penalty and in 1998 reduced the penalty to 10-40%. *See supra* at 156-157.

9. Lower courts in North Carolina have decided cases where local authorities had assessed the post-amendments drug tax. The courts in these cases, however, have not discussed the 1995, 1997, or 1998 amendments and have not addressed whether the post-amendments drug tax contains the punitive characteristics necessary render it a criminal penalty under *Kurth Ranch*. Rather, the courts relied on North Carolina's Supreme Court ruling in *Ballenger* and

(Cont'd)

considered whether North Carolina's post- amendments drug tax provides the "the clearest proof" of punitive purpose or effect necessary to override the General Assembly's intent to create a civil law and transform it into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 99-100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (holding that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty") (internal citations omitted).[10] Based on the wide-

(Cont'd)
summarily held, without comment, that the drug tax is not a criminal penalty. *See, e.g., State v. Crenshaw*, 144 N.C. App. 574, 551 S.E.2d 147, 151 (2001) (stating that *Lynn* "is not binding on our State courts" and overruling a double jeopardy objection on that basis). Regardless, even if North Carolina's pre 1995 amendment drug tax and post-amendments drug tax were substantially the same, the North Carolina Supreme Court is not bound by its prior decision and can overturn it. *See Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986).

10. Under *Hudson*, to determine whether a sanction is a civil or criminal penalty, a court must (1) "ask whether the legislature 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,' " *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493 (quoting *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)), and then, if the sanction was intended to be civil in nature, (2) " 'inquir[e] further whether the statutory scheme was so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' " *id.* (quoting *Ward*, 448 U.S. at 248-49, 100 S. Ct. 2636, and *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219, 100 L.Ed. 149 (1956)). This second inquiry is guided by the factors discussed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963),
(Cont'd)

ranging amendments to the drug tax and the fact that Appellants make no claim that the amendments were insubstantial, we decline to hold that North Carolina's post-amendments drug tax is sufficiently similar to the pre 1995 amendment drug tax such that we should treat them the same.[11] Simply put, an assertion that the North Carolina

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and " 'considered in relation to the statute on its face,' " *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493 (quoting *Kennedy*, 372 U.S. at 169, 83 S. Ct. 554). The Court noted, "important [ly] . . . , [that] only 'the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Ward*, 448 U.S. at 249, 100 S. Ct. 2636). Although *Hudson*, 522 U.S. at 101-02, 118 S. Ct. 488, expressly overruled the method of analysis in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), on which *Kurth Ranch* relied, we recognized in *Lynn* that Hudson's " 'clearest proof' " requirement "does not appear to make the challenger's burden any tougher than it already was." *See Lynn*, 134 F.3d at 592 n.10 (quoting *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493).

11. For example, under North Carolina's pre-1995 amendment drug tax, the plaintiff in *Lynn* was assessed $389,000 for possession of 970 grams of cocaine. *See Lynn*, 134 F.3d at 584 (calculating a $200 per gram tax plus a 100% penalty plus $1,125 interest). Under North Carolina's post-amendments drug tax, the same 970 grams of cocaine would only be assessed approximately $67,920 ($50 per gram plus a 40% penalty), which would be approximately one-sixth of the assessed amount. Likewise, in the instant case, Appellants would have been assessed approximately $48,400 for their 1208 ecstasy pills under North Carolina's pre-1995 amendment drug tax ($200 per 10 dosage units plus a 100% penalty) while they were in fact only assessed $8,667.13 under the post-amendments drug tax
(Cont'd)

courts will likely decide a constitutional issue in a way contrary to what Appellants believe the Constitution mandates is not a sufficient basis to avoid application of *Younger* abstention. *See Leonard v. Hammond*, 804 F.2d 838, 840-41 (4th Cir. 1986) (noting that futility was not demonstrated by a North Carolina Supreme Court ruling because the North Carolina Supreme Court could modify or reverse a prior holding). Because our decision in *Lynn* and the North Carolina cases Appellants cite are not controlling for their situation, Appellants cannot demonstrate the type of futility that must be established to justify federal court intervention in an ongoing state proceeding.[12]

2.

Appellants argue in the alternative that *Younger* abstention is inappropriate under the reasoning of *Gilliam v. Foster*, 75 F.3d 881, 903 (4th Cir. 1996) (en banc) (*Gilliam*

(Cont'd)

($50 per 10 dosage units plus a 40% penalty), which is approximately one-sixth of what would have been assessed under the pre-1995 amendment drug tax. Moreover, the post-amendments drug tax is not conditioned on a criminal offense, and payment of the tax cannot be used to criminally prosecute the taxpayer.

12. We have acknowledged, albeit in the habeas corpus context, that North Carolina's decisions holding that the pre-amendment drug tax was distinguishable from the tax in *Kurth Ranch* are not objectively unreasonable. *See Vick v. Williams*, 233 F.3d 213, 220-22 (4th Cir. 2000) (holding in a habeas challenge under § 2254 that North Carolina's decisions upholding the pre-amendment drug tax as non-criminal were not an objectively unreasonable interpretation of federal law).

III). Specifically, they contend that *Gilliam III* stands for the proposition that the mere allegation of "a colorable claim" of a double jeopardy violation is sufficient to establish exceptional circumstances warranting federal court intervention without any separate showing. *Gilliam III*, 75 F.3d at 904. Finding Appellants' reliance on *Gilliam III* misplaced, we reject their overly expansive interpretation of that case.

In *Gilliam III*, petitioners argued that because a state trial judge granted a mistrial over their objection and in the absence of manifest necessity during their first trial, subjecting them to a second criminal prosecution would violate their rights under the Double Jeopardy Clause. We did not hold that an allegation of a double jeopardy violation automatically precludes *Younger* abstention. Rather, after detailing the well-settled double jeopardy jurisprudence protecting individuals against successive prosecutions for the same offense, we concluded that petitioners' allegations established a substantial likelihood of an irreparable double jeopardy violation. *Id.* at 893-95. We expressly based our decision not to abstain under *Younger* on the fact that a "portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure *the second trial* before seeking to vindicate their constitutional rights at the federal level." *Id.* at 904 (emphasis added); *see also Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) (concluding that the protection from multiple trials for the same offense afforded by the Double Jeopardy Clause "would be significantly undermined if appellate review were postponed until after conviction and sentence").

In contrast, Appellants have presented a much less compelling argument that absent federal court intervention, they will suffer an immediate and irreparable constitutional deprivation. *See e.g.*, *Younger*, 401 U.S. at 44, 91 S. Ct. 746. Unlike the defendants in *Gilliam III*, Appellants yet have access to pretrial avenues in their current criminal prosecutions whereby they may raise their constitutional contentions before any double jeopardy injury could inure. *See supra* at 153; *see also* N.C. Gen. Stat. § 15A- 952(a) (2001) ("Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion."); *Gilliam III*, 75 F.3d at 889 (noting that the defendants had filed a motion to dismiss on double jeopardy grounds in the state courts prior to their second trial and appealed the denial of that motion to the South Carolina Supreme Court before invoking federal jurisdiction); *cf. Gerstein v. Pugh*, 420 U.S. 103, 107-08 n.9, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (finding state forum inadequate because there was no preliminary hearing at which plaintiffs could present constitutional claims as to pretrial conditions). Because jeopardy does not attach during pretrial procedures and motions, *Crist v. Bretz*, 437 U.S. 28, 50, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) ("[I]t has never been held that jeopardy attaches as of the making or deciding of pretrial motions."), and Appellants have state procedures whereby they may foreclose a violation of their double jeopardy rights, any double jeopardy harm at this stage of Appellants' litigation is neither immediate nor irreparable. Appellants must raise their contentions in their current prosecution and appeal any undesirable decision before a

federal district court asserts jurisdiction.[13] *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984) (noting that the defendant had filed a pretrial motion to dismiss and appealed it to the Massachusetts Supreme Court before invoking federal jurisdiction); *Willhauck v. Flanagan*, 448 U.S. 1323, 1325-26, 101 S. Ct. 10, 65 L. Ed. 2d 1147 (1980) (Brennan, Circuit Justice) (denying consideration of a writ of certiorari for a claim based on double jeopardy due to a lack of "irreparable harm" because "once jeopardy [attaches for the first time], [a defendant] should . . . make his claim before the [state] trial judge [in his second trial], at which time the courts can give due consideration to his claim"). Because Appellants have not made a showing of an immediate and irreparable constitutional injury absent federal court intervention, *Gilliam III* does not permit us to disregard *Younger*.

We also note that Appellants have not shown a "great" or "substantial" likelihood that they will suffer any

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13. Because Appellants have pretrial avenues to raise their double jeopardy claim before the North Carolina courts, we need not resolve the issue of whether a federal district court should exercise its jurisdiction over Appellants' claim once they have exhausted North Carolina's pre-trial procedures. *See Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) ("[I]n view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is both great and immediate. . . . Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense to a single criminal prosecution.").

constitutional deprivation. *See, e.g., Younger*, 401 U.S. at 45 (holding that "danger of irreparable loss [must be] great and immediate"); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (holding that a "*substantial and immediate irreparable* injury" is a precondition to invoking the exceptional circumstances exception to *Younger* abstention). For Appellants to establish that their prosecution violates double jeopardy by exposing them to multiple criminal punishments, they must prove: (1) that the payment of the drug tax was a criminal penalty; (2) that took place in a separate proceeding; (3) for the same offense for which they are now being prosecuted. *See Hudson*, 522 U.S. at 98, 118 S. Ct. 488 (setting forth test for double jeopardy violation based upon multiple punishments). As is set forth below, there are numerous, significant impediments to Appellants' ability to make this showing.

Initially, it is arguable whether the current version of North Carolina's drug tax constitutes criminal punishment within the meaning of *Hudson. See Hudson*, 522 U.S. at 98, 118 S. Ct. 488 (concluding that administrative sanctions were not sufficiently punitive and, therefore, were not criminal penalties for purposes of double jeopardy); *see also Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (discussing role of statutory construction in determining whether penalty is civil or criminal under *Hudson*); *see generally* Lisa Melenyzer, *Double Jeopardy Protections from Civil Sanctions after Hudson v. United States*, 89 J. Crim. L. & Crim. 1007, 1009-1011, 1016-23 (1999) (explaining the evolution, criticisms, and limits of the multiple punishment doctrine). Appellants contend that the drug tax is a criminal penalty on the basis of *Lynn.*

We cannot agree that *Lynn* is controlling. As is discussed at length above, *see supra* at 156-158, since *Lynn* was decided, North Carolina has significantly amended its drug tax laws. These amendments have yet to be analyzed to determine whether those portions of the drug tax that were discussed in *Lynn* have been altered such that the drug tax no longer implicates any federal constitutional concern. *See* N.C. Gen. Stat. §§ 105-113.107(a), (2a), -113,110A, - 236.

Assuming *arguendo* that the current drug tax is a criminal penalty, it is not clear that the payment of the drug tax took place in a prior "proceeding" within the meaning of *Hudson*. *See Hudson*, 522 U.S. at 99, 118 S. Ct. 488 (concluding that the Double Jeopardy Clause protects individuals from the imposition of "multiple criminal punishments" for the same offense, but "*only when such occurs in successive proceedings.*"). When Appellants received their drug tax assessment, they simply paid the tax; they apparently did not participate in a hearing or an appearance of any type. Under *Hudson*, if there has been no prior "proceeding," Appellants' current prosecution cannot be successive and, thus, the Double Jeopardy Clause would not be implicated.

Similarly, to the extent that the assessment of the drug tax is part of the current prosecution, and not a separate proceeding, there likely is no double jeopardy restriction on imposing both types of punishment, irrespective of whether the drug tax is deemed a "criminal" punishment. *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) ("Where . . . a legislature specifically authorized cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . .

the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *United States v. Studifin*, 240 F.3d 415, 418 (4th Cir. 2001) ("Where the issue is solely that of multiple punishment, as opposed to multiple prosecutions, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *United States v. Terry*, 86 F.3d 353, 355 (4th Cir. 1996) ("If [the Legislature] clearly authorizes multiple punishments for the same act or transaction, the Double Jeopardy Clause is not offended when the multiple punishments are imposed after a single trial."); *Cummings v. Evans*, 161 F.3d 610, 614 (10th Cir. 1998) (holding that the double jeopardy inquiry is limited to determining "whether [the] state legislature intended to prescribe cumulative punishments for a single criminal incident, [and] we are bound by a state court's determination of the legislature's intent"). Thus, if the General Assembly of North Carolina contemplated and in fact intended that drug dealers be criminally punished for any drug offenses *and* assessed a tax for any unauthorized substances in their possession, *see* N.C. Gen. Stat. § 105- 113.105 (2000) ("Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance."), there is no double jeopardy bar on North

Carolina prosecuting, and a court imposing, both a criminal punishment and a drug tax assessment in a single proceeding.[14] In sum, we are not persuaded that there is a substantial likelihood that Appellants' prosecution is violative of double jeopardy principles.

None of this is to say that Appellants ultimately will not prevail on their double jeopardy claim. It is only to say that where the alleged double jeopardy violation is far from clear, immediate, or irreparable, the important *Younger* policy of allowing the State to pursue its prosecution free from federal court intervention outweighs the Appellants' interest in having the double jeopardy issue resolved in a federal forum. *Commonwealth of Va. v. Kelly*, 29 F.3d 145, 147-48 (4th Cir. 1994) ("There being little, if any, likelihood that Kelly can succeed on the merits of his federal double jeopardy claim, and the public interests weighing heavily in favor of the Commonwealth's ability to pursue its criminal proceedings free of federal court intervention, the district court erred in staying Kelly's . . . trial. . . ." (internal citations omitted)); *Stevens*, 675 F.2d at 949 (holding that "the *Younger* policy is the weightier when the defendant is not being asked to undergo a second trial"). Thus, in balancing the important policies underlying *Younger*, we conclude that Appellants have not established the existence of a substantial and

14. The Due Process Clause also assures that what punishment is imposed has prior legislative approval. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-29, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (Scalia, J., concurring in judgment) (discussing the breadth of the Due Process Clause and how it is a guarantee of the process provided by the law of the land); *Crist v. Bretz*, 437 U.S. 28, 51, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) (holding that the Due Process Clause protects against prosecutorial abuse).

immediate danger of irreparable constitutional loss warranting federal court intervention.

III.

In conclusion, the issue before us is not whether Appellants will suffer unconstitutional multiple punishments; rather, it is whether a federal court should intervene into a state court proceeding to decide the federal constitutional issues for the state court. The essence of *Younger* is comity – state courts are equally entitled to, and capable of, interpreting constitutional law:

> [S]ince both federal and state courts have a duty to enforce the Constitution, there is no constitutional basis, in the absence of some demonstrable infirmity in the state judicial process itself, for preferring federal courts to state courts as adjudicators of federal constitutional claims.

1 Laurence H. Tribe, *American Constitutional Law*, § 3-28 at 570 (3d ed. 2000). "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431, 102 S. Ct. 2515. Because Appellants failed to establish any of the exceptions to *Younger*, we conclude that the district court did not abuse its discretion in abstaining from adjudicating Appellants' double jeopardy claim.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION DATED AND FILED FEBRUARY 4, 2002

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

No. 3:01CV582-MU

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed: February 4, 2002]

Appendix B

ORDER

Since the beginning of this country's history Congress has, subject to few exceptions, man Vesteda desire to permit state courts to try cases free from interference from federal courts.[1]

THIS MATTER is before the Court upon Plaintiffs' motion for a temporary restraining order and preliminary injunction ("Motion"), filed October 29th, 2001; Defendant's Response, filed November 14th, 2001; Plaintiffs' Reply as to Preliminary Injunction, filed November 26th, 2001; Defendant's Motion to Dismiss, filed November 14th, 2001; Plaintiff Response to Motion to Dismiss, filed November 26th, 2001; and Defendant's Reply to Plaintiffs' Response to Motion to Dismiss, filed December 4th, 2001.[2]

Plaintiffs have requested this Court to enjoin Mr. Gilchrist from prosecuting the Plaintiffs, who were defendants in trials scheduled for the November 5th, 2001, term of the Superior Court for Mecklenburg County.[3]

1. *Younger v. Harris*, 401 U.S. 37, 43 (1971).

2. By stipulation of the parties, the motion for a temporary restraining and preliminary injunction order was stayed informally when Gilchrist and his office agreed not to try the Plaintiffs before January 2002. (Def.'s Mot. Dig, at 3.) Because the Court finds it currently lacks authority to intervene in this State matter, the motion for a temporary restraining order and preliminary injunction is hereby DENIED for failure to establish jurisdiction.

3. The requested injunction apparently would apply to Mecklenburg County Superior Court case numbers 00CRS3 1384 through 31387; 00CRS28893 through 28895, 28913, 28916, 28917, 28919, 28920; and O1CRS1 16688, and 116689.

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Plaintiffs were arrested on July 8°'. 2000, and charged with violating the North Carolina Controlled Substance Act for allegedly selling ecstasy to undercover agents on different occasions during the summer of 2000. Pursuant to the North Carolina Controlled Substance Tax Act, North Carolina General Statute section 105-2D "drug tax," Plaintiffs were assessed with tax, penalty, and interest, which they paid in full. Having paid this tax, the Plaintiffs were indicted in Superior Court on charges related to the same alleged drug violations and, in the trials described in footnote two, face criminal sentencing if found guilty.

Maintaining that the tax is a criminal, and not civil, penalty, Plaintiffs filed for an injunction based on the premise that if the tax is a criminal penalty, collecting the tax and then instituting a subsequent injunction places the Plaintiffs in double jeopardy. As interpreted by Plaintiffs, North Carolina state law maintains that the drug tax is a civil penalty, while the Fourth Circuit views the tax as criminal. Thus, Plaintiffs' argument runs, there is a conflict in state and federal law, which if resolved by this Court so as to agree that the tax is a criminal penalty, could indicate that the Superior Court proceeding posed a double jeopardy risk. This action, specifically, is brought pursuant to 42 U.S.C. § 1983, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Fifth and Fourteenth Amendments to the United States Constitution. Because this Court must abstain from exercising jurisdiction, however, it will not answer questions related to the characterization of the drug tax at this time.

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Plaintiffs move the Court to interfere with a state court proceeding, so federalist principles require the Court to first determine whether it may overcome the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), which generally precludes federal courts from enjoining pending state proceedings. This threshold jurisdictional problem is central to the Motion to Dismiss, and the Court will focus the analysis on that Motion and the responsive pleadings. A federal court cannot raise *Younger sua sponte*, however Defendants pled it in their Motion to Dismiss.

Defendants correctly argue that *Younger* requires this Court to abstain from exercising jurisdiction. In rationalizing the holding that, absent limited exceptions, federal courts do not intervene in state proceedings, Justice Black wrote that restraining federal intervention was integral to protecting the states' right to breathing space; phrased differently:

> [to] avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better

> and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our United States, occupies a highly important place in our Nation's history and its future. 401 U.S. at 44-5.

For these reasons, *Younger* only allows four exceptions to the doctrine of nonintervention. *See* 401 U.S. at 43. Of these, only the last pertains to the instant matter: "a judicial exception to the longstanding policy . . . has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages." *Id.* The situation at bar does not subject the Plaintiffs to irreparable damages because they are entitled to take advantage of North Carolina's own appellate process, and ultimately of the United States Supreme Court if that tribunal grants certiorari.

Yet Plaintiffs urge that the double jeopardy risk poses the kind of extreme situation where an exception is proper. For this contention, Plaintiffs stand heavily but unsteadily upon *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996). (Pl.'s Resp. Mot. Dis. at 14). *Gilliam* does indeed state that district courts can intervene when there is a double jeopardy problem. Specifically, the logical progression is that the federal court does not intervene, generally, absent "the most narrow and extraordinary circumstances." *Id.* at 903. Intervention is usually proper only when the movant shows "bad faith, harassment, *or any other unusual circumstance that would call for equitable relief.*" *Id.* (quoting and supplying emphasis to *Younger*, 401 U.S. at 54). In *Gilliam*, as in the instant case, there is clearly no bad faith or harassment. The jurisprudential advancement made in *Gilliam* is the holding, having reached this point in the analysis, that "the irreparable deprivation of th[e] Fifth Amendment Double Jeopardy right is an extraordinary circumstance warranting federal court equitable intervention in Petitioner's state criminal proceeding." *Id.* at 904 (and noting in footnote 27 that "Obviously, Petitioners already had been required to defend themselves in one criminal proceeding, and it was their *second criminal trial* from which they sought federal . . . relief."). And it is with this holding – with the recognition that "proceeding" and "trial" are, in this limited sense, interchangeable and necessary for double jeopardy intervention – that *Gilliam's* factual situation and Plaintiffs' part ways.

Gilliam turns on the black-letter law that jeopardy attaches when the jury is empaneled and sworn. *See* 75 F.3d 893. In the instant matter, jeopardy has not attached because there has not been a prosecution, no jury has been sworn.

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Rather, a tax was demanded of Plaintiffs, who paid it without resort to an adversarial contest. Jeopardy not having attached even once, there is of course no possibility for it to attach a second time. This matter is, therefore, not an instance of double jeopardy, rendering unripe the question of whether federal courts can intervene in state proceedings to prevent double jeopardy (although the Court recognizes that it could intervene in a situation meeting *Gilliam's* requirements). This is clearly the point that the Fourth Circuit makes when it states in its reasoning for Gilliam that "when the record demonstrates that a second criminal trial will constitute a violation of the defendant's double jeopardy rights, federal court intervention is appropriate." *Id.* at 905 (emphasis supplied). Indeed, after specific inquiry into what the Fifth Amendment means by "double jeopardy," throughout the passages of the opinion where *Younger* is discussed, Judge Wilkins deems that double jeopardy arises from a second trial, and uses the phrase "second trial" repeatedly. In fact defining double jeopardy as connected to a second trial is a major holding of that case. *Gilliam's* outcome is absolutely contingent on the fact that, in that case, a second trial was underway. The mere payment of a tax does not constitute a prosecution, but rather a penalty, so based on this quotation from *Gilliam* the Superior Court trial set for later this month – a first prosecution – appears to be the kind of situation in which the Fourth Circuit would not endorse intervention. If the Plaintiff wants to argue that the drug tax somehow constitutes a prosecution, it should argue the North Carolina legal issue before a North Carolina court.

A sister court discussed this distinction half a decade ago. In *Murphy v. Virginia*, 896 F. Supp. 577, 580 (E.D. Va. 1995), Judge Ellis wrote:

> Younger rests on two separate yet mutually supportive pillars. The first is the traditional equitable principle that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." The second and primary rationale underlying the doctrine is comity, the prudential constraints of federalism. (quoting *Younger*, 401 U.S. at 43-44).

Plaintiffs here have an adequate remedy at law. And, since (although they have paid a tax) they have not yet been prosecuted, they are not at risk at least for the kind of irreparable injury described in Gilliam that would arise if there happened to be a double jeopardy issue, a "special circumstance." *Id.* at 581 (citation omitted).

That special circumstance can only happen when a defendant has incurred time, expense, and anxiety through a first trial but has not been vindicated. Before resorting to the federal courts he must see that the state has no remedy for him – that he has hit the impenetrable stone wall where the sidewalk ends and state jurisprudence is finally exhausted, and where state courts have said all they are entitled to say:

> In the context of certain double jeopardy claims, the reasoning is similarly clear: once a

> criminal defendant has fruitlessly pursued all state remedies available to him, "there is no further bar to the assumption of federal jurisdiction, for the deference owed to the state judicial system demanded by principles of comity and federalism has been paid." *Id.* at 582 (quoting *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979).

When a criminal defendant pays a drug tax without trial or contest, and is subsequently prosecuted, the wall he must reach before he can litigate here is still far down the sidewalk. Such is Plaintiffs' situation.

This observation is similar to the crux of the thinking expressed in Murphy, where the court found that subjection to multiple *punishments* was not the same as exposure to multiple prosecutions. *Id.* at 582 (noting the "distinction in the double jeopardy context between cases involving the threat of multiple prosecutions and those involving the thread [sic] of multiple punishments."). Thus, "[i]f an accused is facing multiple convictions (and, therefore, multiple punishments) in violation of the Double Jeopardy Clause, he may appeal those convictions to obtain full relief. If, by contrast, he faces multiple *prosecutions*, neither the second (or third, or fourth) *trial itself* nor an appeal therefrom can provide him with a remedy; the trial itself is the punishment." In the instant matter, Plaintiffs have not yet been put through the inconvenience, or "punishment" as Judge Ellis aptly described it – of a second trial. They have merely paid taxes, a form of punishment which they doubtless could have contested at the time they were levied, or subsequently. If they find the taxes problematic, they can take it up in North

Carolina's judicial system. For even if those taxes are criminal in nature – and this Court will not reach the analysis of whether they are or are not – they are a criminal *penalty*, not a prosecution.

Younger is clear that this Court must not intervene "unless it plainly appears that [a] course would not afford adequate state protection." 401 U.S. at 45. For the reasons given, Plaintiffs have not yet taken the actions necessary to demonstrate to this Court that North Carolina has not protected their rights. If Plaintiffs still harbor concerns about the integrity of their Constitutional rights after reaching the wall where state recourse is exhausted, they may of course file again.

IT IS THEREFORE ORDERED that Plaintiffs' action is *dismissed without prejudice* because this Court lacks subject matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). IT IS FURTHER ORDERED that any remaining outstanding motions are hereby DENIED as moot.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1176

KENNETH SCOTT NIVENS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
GLEN LANCE MANERS,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;
TERRI LYNN STORK,
Individually and as representatives of a class
Pursuant to Rule 23, Fed. R. Civ. P.;

Plaintiffs-Appellants

v.

PETER S. GILCHRIST, III,
In his official capacity as District Attorney
For the 26th Prosecutorial District
For the State of North Carolina,
And as representative of a class
Pursuant to Rule 23, Fed. R. Civ. P.,

Defendant-Appellee

[Filed: March 11, 2003]

Appendix C

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const., amend. V:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

2. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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3. N.C.G.S. § 105-113.105. Purpose

> The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

4. N.C.G.S. § 105-113.107. Excise tax on unauthorized substances

> (a) Controlled Substances.—An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:
>
> > (1) At the rate of forty cents (40¢) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.
> >
> > (1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.
> >
> > (1b) At the rate of fifty dollars ($50.00) for each gram, or fraction thereof, of cocaine.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of two hundred dollars ($200.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

(a1) Weight.—A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(b) Illicit Spirituous Liquor.—An excise tax is levied on illicit spirituous liquor possessed by a dealer at the following rates:

(1) At the rate of thirty-one dollars and seventy cents ($31.70) for each gallon, or fraction thereof, of illicit spirituous liquor sold by the drink.

(2) At the rate of twelve dollars and eighty cents ($12.80) for each gallon, or fraction thereof, of illicit spirituous liquor not sold by the drink.

(c) Mash.—An excise tax is levied on mash possessed by a dealer at the rate of one dollar and twenty-eight cents ($1.28) for each gallon or fraction thereof.

(d) Illicit Mixed Beverages.—A tax is levied on illicit mixed beverages sold by a dealer at the rate of twenty dollars ($20.00) on each four liters and a proportional sum on lesser quantities.

5. N.C.G.S. § 105-113.107A. Exemptions

(a) Authorized Possession.—The tax levied in this Article does not apply to a substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts.—The tax levied in this Artiele does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant.

6. N.C.G.S. § 105-113.108. Reports; revenue stamps

(a) Revenue Stamps. — The Secretary shall issue stamps to affix to unauthorized substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person.

(b) Reports. — Every local law enforcement agency and every State law enforcement agency must report to the Department within 48 hours after seizing an unauthorized substance, or making an arrest of an individual in possession of an unauthorized substance, listed in this subsection

upon which a stamp has not been affixed. The report must be in the form prescribed by the Secretary and it must include the time and place of the arrest or seizure, the amount, location, and kind of substance, the identification of an individual in possession of the substance and that individual's social security number, and any other information prescribed by the Secretary. The report must be made when the arrest or seizure involves any of the following unauthorized substances upon which a stamp has not been affixed as required by this Article:

(1) More than 42.5 grams of marijuana.

(2) Seven or more grams of any other controlled substance that is sold by weight.

(3) Ten or more dosage units of any other controlled substance that is not sold by weight.

(4) Any illicit mixed beverage.

(5) Any illicit spirituous liquor.

(6) Mash.

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7. N.C.G.S. § 105-113.109. When tax payable

The tax imposed by this Article is payable by any dealer who actually or constructively possesses an unauthorized substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires actual or constructive possession of a non-tax- paid unauthorized substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the unauthorized substance. Once the tax due on an unauthorized substance has been paid, no additional tax is due under this Article even though the unauthorized substance may be handled by other dealers.

8. § 105-113.111. Assessments

Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall

be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter.

9. N.C.G.S. § 105-241. Where and how taxes payable; tax period; liens

. . .

(d) Lien.—This subsection applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article. The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. . . .

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10. 1998 North Carolina Laws S.L. 1998-218 (S.B. 1554)

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

S.L. 1998-218

S.B. No. 1554

EXCISE TAX AMENDMENT—CONTROLLED SUBSTANCES

AN ACT TO AMEND THE EXCISE TAX ON CONTROLLED SUBSTANCES.

Whereas, North Carolina enacted the Controlled Substances Tax Act in 1989 for the purpose of levying an excise tax to generate revenue for State and local law enforcement agencies and the General Fund and to collect taxes from persons engaged in a highly profitable activity that had escaped taxation; and

Whereas, the intent of the General Assembly in enacting this tax continues to be to raise revenue through a civil tax on this highly profitable activity; and

Whereas, the intent of the General Assembly in enacting this tax is not to create a criminal penalty, other than for nonpayment of the tax, above and beyond the criminal sanctions in the criminal code; and

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Whereas, upon constitutional challenge on double jeopardy grounds by a defendant who had been assessed for the tax and also convicted of criminal drug charges, the North Carolina Court of Appeals held that the tax "was not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed"; and

Whereas, the court further held that the statute "is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling, or manufacturing large quantities of controlled drugs" and that the statute "does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause"; and

Whereas, that decision was affirmed on appeal to the North Carolina Supreme Court and not disturbed by the United States Supreme Court; and

Whereas, upon further challenge in the federal courts, the controlled substance tax was found in 1998 to be a criminal penalty, and the United States Supreme Court let the federal ruling stand; and

Whereas, according to law enforcement officials, the current market price of cocaine is approximately $100.00 per gram and hence the excise tax rate proposed by this act

is proportionately less than the tax imposed by the taxing authorities in many states upon cigarettes; and

Whereas, it is, therefore, the intent of the North Carolina General Assembly to modify the tax in accordance with the recent federal court ruling, so that the tax may continue to be assessed in a manner consistent with the law as interpreted by the federal courts; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. G.S. 105-113.107(a) reads as rewritten:

<< NC ST § 105-113.107 >>

(a) Controlled Substances. — An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40 cents) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

<<+(1b) At the rate of fifty dollars ($50.00) for each gram, or fraction thereof, of cocaine.+>>

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of <<-four hundred dollars ($400.00)->> <<+two hundred dollars ($200.00)+>> for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

<<+(a1) Weight. —+>> A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

Section 2. G.S. 105-113.110A reads as rewritten:

<< NC ST § 105-113.110A >>

§ 105-113.110A. <<-Interest and penalty.->> <<+Administration.+>>

<<-The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(i) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a

penalty equal to fifty percent (50%) of the tax.->> <<+Article 9 of this Chapter applies to this Article.+>>

Section 3. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of October, 1998.

Approved 1:58 p.m. this 31st day of October, 1998.

Supreme Court, U.S.
FILED
MAY 9 - 2003
OFFICE OF THE CLERK

No. 02-1477

IN THE

Supreme Court of the United States

KENNETH SCOTT NIVENS
GLEN LANCE MANERS
TERRI LYNN STORK,

Petitioners,

v.

PETER S. GILCHRIST, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROY COOPER
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May 9, 2003

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QUESTIONS PRESENTED

I. WHETHER ALLEGED CONFLICTS OF THE COURT OF APPEALS' DECISION WITH THOSE OF OTHER CIRCUITS JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI, WHEN THOSE ALLEGED CONFLICTS ARE AT MOST INSUBSTANTIAL AND TANGENTIAL TO THE DECISION OF THIS CASE.

II. WHETHER THE COURT OF APPEALS' DECISION IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *HUDSON V. UNITED STATES*, 522 U.S. 93 (1997).

III. WHETHER PETITIONERS HAVE CITED ANY ADVERSE CONSEQUENCES THE AVOIDANCE OF WHICH WOULD MAKE THIS CASE APPROPRIATE FOR REVIEW ON CERTIORARI.

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STATEMENT OF THE CASE

Petitioners Kenneth Scott Nivens, Glen Lance Maners, and Terri Lynn Stork (hereafter collectively "petitioners") initiated this civil action in the United States District Court for the Western District of North Carolina on 18 October 2001 by mailing and faxing their complaint to defendant Peter S. Gilchrist III, the elected District Attorney for North Carolina Prosecutorial District 26, Mecklenburg County, North Carolina (hereafter "Gilchrist"). Petitioners brought their action pursuant to 42 U.S.C. § 1983, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Fifth and Fourteenth Amendments to the United States Constitution, seeking declaratory and injunctive relief to prevent the State of North Carolina from prosecuting petitioners for criminal offenses involving the possession and sale of hundreds of "ecstasy" pills. Appendix to Brief In Opposition (hereafter "App.") at 1a-8a.

According to their complaint, petitioners were all arrested on 8 July 2000 for violations of North Carolina's criminal laws for offenses involving the sale by petitioner Stork of 15 ecstasy pills, the sale by Chad Hess of 125 ecstasy pills, the sale by petitioner Nivens of 184 ecstasy pills to petitioner Maners, and the possession of 701 ecstasy pills by petitioner Nivens in a car driven by petitioner Stork. Compl. ¶ 9, App. at 4a. Also in July of 2000, petitioners Stork, Nivens and Maners were assessed with taxes, penalties, and interest pursuant to North Carolina laws governing Unauthorized Substances Taxes (the "drug tax"), N.C. GEN. STAT. §§ 105-113.105 *et seq.*, in the

amount of $6,259.67 on the 884 ecstasy pills that were the subjects of several indictments. Compl. ¶ 10, App. at 4a-5a. In addition, petitioner Maners was assessed a tax which, with penalty and interest, amounted to $1,336.33 on the 184 ecstasy pills that were the subjects of three indictments. Compl. ¶ 11, App. at 5a. Petitioner Stork was also assessed a tax which, with interest and penalty, amounted to $1,081.13 on the 140 ecstasy pills that were the subject of four indictments. Compl. ¶ 12, App. at 5a. All of the petitioners paid the taxes in full either the month they were assessed or the following month. Compl. ¶¶ 10-12, App. at 4a-5a.

On 13 November 2001, Gilchrist moved to dismiss the complaint for lack of jurisdiction pursuant to F. R. Civ. P. Rule 12(b)(1) or to abstain from exercising jurisdiction under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and, at the same time, moved to dismiss the action for failure to state a claim upon which relief may be granted pursuant to F.R. Civ. P. Rule 12(b)(6). On 4 February 2002, the district court granted the motion to dismiss based on the *Younger* abstention doctrine, without prejudice, and denied all other outstanding motions as moot. The district court thus avoided the need to reach the question of whether the complaint failed to state a claim upon which relief may be granted. Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") at 26a-34a. A judgment of dismissal was entered the same day.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and on 11 February 2003 the court of appeals filed its decision affirming the district court. Pet. App.

at 1a-24a. Citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the court of appeals concluded that the State of North Carolina, in its criminal prosecution of petitioners, had an ongoing proceeding that implicates important, substantial and vital interests of the State in preventing criminal violations and that petitioners have an adequate opportunity to raise their federal claims in the North Carolina courts. Accordingly, the court of appeals declared that the trial court did not abuse its discretion in abstaining unless petitioners could show that their case fell within an exception to the rule favoring abstention when a state has a pending criminal prosecution. Pet. App. at 5a-6a. The court of appeals further concluded that petitioners could not show they fell within any exception to the *Younger* abstention doctrine. In particular, petitioners did not allege bad faith or harassment, and they still have an opportunity to have the state courts address their constitutional claims. Pet. App. at 7a. Nor could they show the lack of an adequate remedy at law or the danger of irreparable injury in the absence of a preliminary injunction. Pet. App. at 8a. Although petitioners argued that the North Carolina courts had erroneously declared the State's "drug tax" constitutional while, according to petitioners, the court of appeals had reached the opposite conclusion, the court of appeals noted that North Carolina had made substantial changes to the state's drug tax laws since the events giving rise to the court of appeals' decision in *Lynn v. West*, 134 F.3d 582, 591 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) (holding that prior, harsher version of North Carolina drug tax constituted a criminal penalty). Therefore, *Lynn* was not precedent contrary to the state courts' decisions, and petitioners could not show the

kind of futility necessary to override *Younger* and justify the issuance of a preliminary injunction. Pet. App. at 16a. Nor could petitioners show that the threat of any alleged injury was immediate and irreparable given their failure thus far to take advantage of any pre-trial proceedings available to them to raise the double jeopardy issue in state court. Pet. App. at 17a-19a. Petitioners were equally unable to show that a "great" or "substantial" likelihood existed that they would suffer any irreparable constitutional injury because the current North Carolina drug tax provisions are arguably not criminal penalties at all and, additionally, it is unclear that petitioners' prompt payment of the drug tax assessments they received from the State constituted a "prior proceeding" to trigger a double jeopardy analysis. Pet. App. at 20a-23a.

On 11 March 2003, petitioners' petitioner for rehearing and rehearing *en banc* was denied by the court of appeals. Pet. App. at 35a-36a.

REASONS FOR DENYING THE WRIT

The petition should be denied because the United States Court of Appeals for the Fourth Circuit correctly upheld the district court's decision to abstain under the principles of *Younger*, 401 U.S. 37. Petitioners' attempts to avoid criminal prosecution for the serious drug charges they face in the North Carolina criminal courts were correctly rejected by both the district court and the court of appeals. Nor have petitioners offered any valid reason for this Court to grant review. Petitioners have failed to show any conflict among the circuit

courts or any conflict between the court of appeals' decision in this case and any of this Court's opinions. Nor have they shown that they in fact have raised a serious double jeopardy claim or that they face a substantial or great threat of immediate and irreparable harm to their rights. This Court has previously rejected all petitions seeking review of cases involving the North Carolina drug tax, including cases raising double jeopardy claims by persons challenging their criminal convictions as well as related civil cases. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App.), *disc. review denied*, 538 S.E.2d 570 (N.C.), *cert. denied*, 528 U.S. 1022 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 538 S.E.2d 576 (N.C.), *cert. denied*, 528 U.S. 1022 (1999); *see also Milligan v. State*, 522 S.E.2d 330 (N.C. Ct. App. 1999), *disc. review denied*, 543 S.E.2d 131 (N.C.), *cert. denied*, 531 U.S. 819 (2000); *Vick v. Williams*, 233 F.3d 213 (4th Cir. 2000), *cert. denied*, 533 U.S. 952 (2001); *Lynn v. West*, 134 F.3d 582. Petitioners' quest for review by this Court should similarly be denied.

I. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON ALLEGED CONFLICTS OF THE COURT OF APPEALS' DECISION WITH THOSE OF OTHER CIRCUITS, WHICH ARE AT MOST INSUBSTANTIAL AND TANGENTIAL TO THE DECISION OF THIS CASE.

Petitioners have attempted to justify certiorari on the theory that the court of appeals' decision conflicts with that of other circuits. They are wrong because the purported conflicts are illusory, at best. Additionally, the issues as to which petitioners allege the court of appeals' decision conflicts with those of other circuits are tangential to the results in this case.

A. Petitioners Have Failed To Show A Genuine Conflict In The Circuits Concerning The Applicable Standard Of Review.

Petitioners complain first that the Fourth Circuit Court of Appeals applied an abuse of discretion standard in reviewing the trial court's decision to abstain. According to petitioners, this creates a conflict with decisions of other circuits that apply a *de novo* standard of review on abstention issues. Petitioners, however, have oversimplified the Fourth Circuit's standard. The court of appeals did state that it "review[ed] the district court's decision to abstain under *Younger* for abuse of discretion," citing *Martin Marietta Corp. v. Maryland Commission on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994). Pet. App. at 4a. However, the court of appeals also cited to *Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir.

1997), for the proposition "that an error of law constitutes an abuse of discretion." Pet. App. at 4a. Then, it proceeded to review the district court's decision, first determining that the basic requirements for *Younger* abstention existed, and then exploring whether the circumstances of this case met the legal standard for an exception to *Younger*. The court of appeals' ultimate conclusion was that "[b]ecause Appellants failed to establish any of the exceptions to *Younger*," "the district court did not abuse its discretion in abstaining from adjudicating Appellants' double jeopardy claim." Pet. App. at 24a. In other words, the court of appeals examined the questions raised by petitioners and determined that the prerequisites for *Younger* abstention existed and further that petitioners failed to establish legally that any of the *Younger* exceptions applied. There was no error of law in the district court's decision, and consequently there was no abuse of discretion. In this respect, the court of appeals was applying essentially a *de novo* standard of review to determine whether abstention was required.

Contrary to petitioners' contentions, the court of appeals in this case applied an analysis equivalent to that used in other cases cited by petitioners to support their claims that the proper standard of review is *de novo*. *See, e.g., Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 637 (1st Cir. 1996) (although denial of preliminary injunction is normally an "abuse of discretion" standard, "[i]f *Younger* applies, however, abstention is mandatory"); *Riley v. Simmons*, 45 F.3d 764, 770 (3d Cir. 1995) ("We review the district court's decision to abstain for abuse of discretion, but the district court's analysis of the law on abstention is subject to de novo review."); *see*

also Schlagler v. Phillips, 166 F.3d 439, 441 (2d Cir. 1999) (citing and following *Brooks)*.

In sum, the court of appeals recognized the need to address the legal question of whether the conditions for abstention had been met, and did so. Its analysis is consistent with that of some of the very cases cited by petitioners and is not meaningfully different from cases simply citing a standard of *de novo* review. At any rate, the fine points of the standard of review had no significant effect on the decision of the court of appeals and provide no basis for this Court to grant its writ of certiorari.

B. Petitioners Have Failed To Show A Conflict Among The Circuits Concerning The Effect Of Binding State Precedent.

Petitioners also seek to persuade this Court to grant review on the theory that a conflict exists among the circuits as to whether abstention is appropriate if state court "precedent makes submitting the federal rights to a state forum futile." Pet. at 7. Petitioners cannot show a conflict in the circuits because the cases they cite for this proposition are all district court cases, and other circuit courts agree with the Fourth Circuit.

What petitioners are complaining about is the failure of the court of appeals to agree that they were entitled to obtain a preliminary injunction because the North Carolina courts have consistently determined that the State's drug tax is not a

criminal penalty on which they can base a double jeopardy claim. The court of appeals, instead, concluded that petitioners' "assertion that the North Carolina courts will likely decide a constitutional issue in a way contrary to what Appellants believe the Constitution mandates is not a sufficient basis to avoid application of *Younger* abstention." Pet. App. at 15a-16a. Other circuit courts, rather than disagreeing, have reached the same conclusion as the Fourth Circuit. *See Hansel v. Town Court for Springfield*, 56 F.3d 391, 394 (1995) (even if New York's highest court had already rejected plaintiff's claim, "[s]o long as a plaintiff is not barred on procedural or technical grounds from raising alleged constitutional infirmities, it cannot be said that state court review of constitutional claims is inadequate for *Younger* purposes"), *cert. denied*, 516 U.S. 1012 (1995); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 224-25 (9th Cir. 1994) (regardless of whether state supreme court had upheld challenged law, *Younger* abstention applicable; "appellants do have an opportunity to raise their claims in state court because they are not procedurally barred from raising such claims"); *Duty Free Shop, Inc. v. Administracion de Terrenos*, 889 F.2d 1181, 1183 (1st Cir. 1989) (fact that state courts have rejected same or similar claims does not mean parties lack an adequate opportunity to raise those claims in state court). Thus, petitioners have failed to show a conflict in the circuits on the question of whether they have an adequate opportunity to raise their claims in state court despite the existence of contrary precedent in the state courts. The court of appeals correctly concluded that they had or have such an opportunity, and petitioners' failed efforts to conjure up a conflict among the

circuits on this issue create no basis for this Court to grant its writ of certiorari.

II. THE COURT OF APPEALS' DECISION IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *HUDSON V. UNITED STATES*, 522 U.S. 93 (1997).

Petitioners contend that the court of appeals' decision is inconsistent with this Court's opinion in *Hudson v. United States*, 522 U.S. 93 (1997). Petitioners, however, are mistaken in their analysis of *Hudson* and their characterization of the court of appeals' decision. Because the court of appeals reached the right result and did so consistently with *Hudson*, this Court should deny the petition for writ of certiorari.

Despite petitioners' arguments to the contrary, the court of appeals' decision is fully consistent with *Hudson*. In *Hudson*, this Court clarified the rules governing the determination whether a civil sanction is in fact a criminal penalty by "reaffirm[ing] the previously established rule exemplified in *United States v. Ward*, 448 U.S. 242, 248-249 (1980)." *Hudson*, 522 U.S. at 96. Under that rule, the "court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,'" and "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 99-100 (quoting *Ward*, 448 U.S. at 248-49).

The court of appeals recognized what *Hudson* established as the overriding issue. Specifically, in discussing North Carolina's drug tax, the court noted that the North Carolina General Assembly has expressly stated that the "intent" of the drug tax legislation was "to raise revenue through a civil tax on this highly profitable activity . . . [and] not to create a criminal penalty." Pet. App. at 12a (quoting An Act to Amend the Excise Tax on Controlled Substances, 1998 N.C. Sess. Laws 218). However, the court of appeals never actually determined whether the relevant drug tax provisions do in fact constitute a criminal penalty under *Hudson*. Instead, the court determined that the drug tax provisions applicable to petitioners have never been addressed expressly by either federal or state courts. This is true because, as the court of appeals recognized, the North Carolina General Assembly has enacted extensive changes to the State's drug tax. They differ greatly from the statutes examined in *Lynn*, 134 F.3d at 591, which declared a prior version of the drug tax to constitute a criminal penalty. Besides the language of legislative intent, the substantive drug tax provisions were changed so that (1) the tax is payable upon receipt of drugs rather than upon a criminal violation, (2) violation of the drug tax laws is no longer a Class I felony, (3) the rate of the tax was significantly reduced, (4) the tax was expanded to cover certain categories of alcoholic beverages, and (5) the penalty was reduced from a special 100% penalty eventually to the same penalty and interest provisions applicable to all late payments of taxes in North Carolina, producing a penalty ranging from 10% to 40%. *See* Pet. App. at 11a-12a; *see also* Pet. App. at 38a-43a; App. at 9a-15a.

Petitioners thus have missed the point of the court of appeals' consideration of *Hudson*. The reason for looking at *Hudson* was not to determine definitively whether the drug tax survives a double jeopardy analysis under *Hudson*, but to determine whether the trial court erred in abstaining under *Younger*. First, the court below correctly concluded that the basic elements of *Younger* abstention existed, citing *Middlesex County*, 457 U.S. 423, for the proposition that there must be an ongoing state judicial proceeding that implicates important, substantial, or vital state interests and that provides an adequate opportunity to raise the federal constitutional issue. Pet. App. at 5a. The first two elements are plainly present in this case, and the court of appeals held that the third element was present. It looked at *Hudson* initially as part of its discussion of the ways in which the drug tax laws had changed and the fact that no court had yet evaluated the current drug tax laws, factors which went into its decision that petitioners could not show that they lacked an adequate opportunity to raise the issue in state court. Pet. App. at 8a-16a.[1]

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[1] Petitioners cited to *Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979), for the proposition that no further deference is due the state courts because, in petitioners' view, "the state's highest court has staked out its position on the issue." Pet. at 8. *Drayton*, however, is a habeas corpus case, and the point in *Drayton* was that the petitioner had exhausted his state court remedies as is required for habeas consideration. Here, petitioners have not raised their double jeopardy claim in state court. Nor have they brought this matter as a habeas claim. Significantly, the Fourth Circuit has held that habeas is not available on double jeopardy claims seeking relief from criminal prosecutions after imposition of a North Carolina drug tax, even under the older, harsher version of the drug tax. *Vick v. Williams*, 233 F.3d 213, 220-22 (4th Cir. 2000), *cert. denied*, 533 U.S. 952 (2001) (North Carolina decisions upholding drug tax not objectively unreasonable).

The court further considered whether petitioners could show a "great" or "substantial" likelihood that they would suffer any constitutional deprivation, citing *Younger*, 401 U.S. at 45 ("'danger of irreparable loss [must be] great and immediate'") and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) ("'substantial and immediate irreparable injury' is a precondition to invoking the exception circumstances exception to *Younger* abstention"). Pet. App. at 20a. Because petitioners could not show that any threatened violation of their constitutional rights would be great or substantial, they had not shown the existence of any exception to *Younger*'s strong preference for abstention in these circumstances. In evaluating the likelihood of any violation of petitioners' rights, the court concluded that "it is arguable whether the current version of North Carolina's drug tax constitutes criminal punishment within the meaning of *Hudson*" in view of the wide-ranging amendments to the North Carolina drug tax that rendered *Lynn* non-controlling. Pet. App. at 20a. Additionally, the court of appeals observed that "it is not clear that the payment of the drug tax took place in a prior 'proceeding' within the meaning of *Hudson*." Pet. App. at 21a. Petitioners, of course, had promptly paid the drug tax assessments as soon as they received them, so it is not at all clear that those taxes were paid as part of any proceeding whatsoever[2]. What is clear is that the court of appeals correctly concluded that there was very little

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[2] Petitioners have at times suggested that the drug tax was imposed in a separate proceeding because they were subject to a lien as a result of the assessment. However, the lien triggered by the assessment is the automatic tax lien that generally attaches as a matter of law whenever a tax is due in North Carolina. *See* Pet. App. at 44a; App. at 16a-17a.

basis for petitioners' claim of a threatened double jeopardy violation.

Petitioners are further mistaken in assuming that a full *Hudson* analysis would help their cause. To the contrary, the North Carolina drug tax is not, in fact, a criminal penalty if analyzed under the factors reaffirmed in *Hudson*, factors previously set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), and endorsed in *Ward*, 448 U.S. at 249-50. *Hudson*, 522 U.S. at 99-100. Specifically, the tax does not involve an affirmative disability or restraint. Taxes have not historically been considered punishment. The tax does not depend on a finding of scienter. It is true that the tax does promote at least one traditional aim of punishment, that of deterrence, but so do other taxes and many other civil sanctions. Thus, "the mere presence of this purpose is insufficient to render a sanction criminal." *Hudson*, 522 U.S. at 105. Additionally, the behavior to which it applies is a crime, but that factor is not dispositive, as this Court held in *Hudson*. *Id.* The tax does serve an alternative purpose of raising revenue through taxing a highly profitable enterprise. N.C. GEN. STAT. § 105-113.105, Pet. App. at 38a; An Act to Amend the Excise Tax on Controlled Substances, 1998 N.C. Sess. Laws 218 (quoted in relevant part by court of appeals, Pet. App. at 12a). Finally, the tax does not appear excessive in relation to the alternative purpose assigned to it, that of raising revenue. Indeed, the petitioners paid less than $9,000.00 total for drug taxes plus penalties and interest, combined, in their efforts to avoid prosecution for the serious criminal charges

facing them[3]. Significantly, the tax is imposed as part of the North Carolina tax laws and administered by the North Carolina Secretary of Revenue in a manner that is now utterly consistent with North Carolina's general tax practices. Thus, contrary to petitioners' contentions, the *Hudson* analysis does not help their cause. Instead, it establishes the complete absence of the "clearest proof" that would be required to conclude that the drug tax provisions are criminal penalties. *Hudson*, 522 U.S. at 100.

Other courts have analyzed similar drug tax laws under the *Kennedy* factors and concluded that the taxes did not constitute criminal penalties or give rise to double jeopardy claims. *See, e.g.*, *Simpson v. Bouker*, 249 F.3d 1204, 1213 (10th Cir. 2001) (addressing Kansas drug tax); *Hill v. State*, 898 P.2d 155, 161 (Okla. Crim. App. 1995). Still other courts have upheld similar drug tax laws by applying, and distinguishing, the decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), which held that

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[3] Petitioners contend that the court of appeals placed excessive emphasis on the rate of tax. Pet. at 9. The court of appeals, however, noted the reduced rate of tax and the reduced penalty provisions partly because of the emphasis on the rate of tax and the penalty in *Lynn*, which held the prior North Carolina drug tax provisions were in fact a criminal penalty. *See Lynn*, 134 F.3d at 589-90. The drastically reduced rate of tax, of course, also made it very difficult to conclude that the present drug tax statutes are not in fact the revenue-raising provisions that the North Carolina General Assembly has declared them to be. Instead, it leads inevitably to the conclusion that North Carolina's current drug tax laws are not "so punitive either in purpose or effect as to transform what was clearly intended as a civil [tax] into a criminal penalty." *Hudson*, 522 U.S. at 99 (citations omitted).

the Montana drug tax was a criminal penalty for double jeopardy purposes. *See, e.g., Padavich v. Thalacker*, 162 F.3d 521, 523 (8th Cir. 1998), *cert. denied*, 527 U.S. 1025 (1999) (addressing Iowa drug tax in light of *Kurth Ranch* and *Hudson*); *Covelli v. Commissioner of Revenue Servs.*, 668 A.2d 699 (Conn. 1995), *vacated and remanded*, 518 U.S. 1031 (1996), *prior opinion aff'd per curiam*, 683 A.2d 737 (Conn. 1996), *cert. denied*, 520 U.S. 1174 (1997); *State v. Baehler*, 604 N.W.2d 601 (Iowa 1999) (taking *Hudson* into consideration and rejecting contention that it threw any doubt on court's earlier case law rejecting contention that Iowa drug tax was a criminal penalty); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *McMullin v. South Carolina Dep't of Revenue & Taxation*, 469 S.E.2d 600 (S.C. 1996); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994).

Admittedly, some other courts have concluded that their states' drug taxes did not pass muster. *See, e.g., People v. Maurello*, 932 P.2d 851 (Colo. Ct. App. 1997); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 296 (1996); *Commissioner of Revenue v. Mullins*, 702 N.E.2d 1 (Mass. 1998); *Desimone v. State*, 996 P.2d 405 (Nev. 2000). In so doing, however, they have generally relied on distinguishing features not present in the North Carolina statutes, such as the lack of confidentiality and protection from criminal prosecution in the Colorado statute. (North Carolina's drug tax statutes provide for confidentiality and protection from prosecution. N.C. GEN. STAT. § 105-113.112, App. at 9a.) In Indiana, the tax was due every forty-eight (48) hours and was imposed at a rate the court determined to be eight times the rate in *Kurth Ranch*. In *Mullins* and *Bryant*, the courts tended to emphasize

the implementation of the statutes "rather than focusing on the statute 'on its face,'" as required by *Hudson*[4]. *Baehler*, 604 N.W.2d at 605 (citing *Hudson*, 522 U.S. at 101). These decisions provide no support for the proposition that the North Carolina drug tax, in its current form, can be considered a criminal penalty when properly analyzed under *Hudson*.

In sum, petitioners have completely failed to show that the court of appeals' decision in any way conflicts with this Court's opinion in *Hudson*. Rather, the court of appeals examined *Hudson* to the extent necessary to determine that petitioners had failed to show any significant threat of the immediate and irreparable harm necessary to override *Younger*'s strong preference for abstention in cases seeking injunctions against pending state criminal prosecutions. Regardless of the lack of a full *Hudson* analysis, the court of appeals' decision is entirely consistent with *Hudson*. Indeed, a full *Hudson* analysis would establish that the North Carolina drug tax is not a criminal penalty, and its assessment would not trigger double jeopardy claims. Consequently, petitioners have

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[4] Requiring that a challenged statute be analyzed on its face is one of the big differences between *Hudson* and the case it overruled, *United States v. Halper*, 490 U.S. 435 (1989). Petitioners mistakenly claim that the court of appeals "disregarded" the reasoning of this Court in *Hudson* when it overruled *Halper*. As petitioners assert, this Court did so in part to avoid the consequence of the *Halper* approach that prevented a determination of the double jeopardy question until the defendant proceeded to judgment. What petitioners miss is that the remedy for this flaw in *Halper* was to return to the *Kennedy* approach of analyzing the challenged statute on its face. *Hudson*, 522 U.S. at 101-02. This is exactly what the court of appeals did.

failed to show that the court of appeals' decision is incorrect or that it conflicts with any decision of this Court.

III. PETITIONERS HAVE CITED NO ADVERSE CONSEQUENCES WHICH WOULD MAKE THIS CASE APPROPRIATE FOR REVIEW ON CERTIORARI.

Petitioners also seek review by this Court on the theory that the court of appeals' decision could cause what they characterize as "serious adverse consequences." Pet. at 10. They seek to bolster this contention by arguing that the court of appeals acted contrary to this Court's decision in *Middlesex County Ethics Comm.*, 457 U.S. 423. They are wrong in claiming that the court of appeals in any way acted contrary to *Middlesex*, and they are equally wrong in asserting that the court of appeals' decision will result in consequences that somehow justify this Court's granting its writ of certiorari.

First, petitioners claim that *Middlesex* required the plaintiff in that case to exhaust his state remedies because the New Jersey Supreme Court had specifically provided for interlocutory appeal to the state's highest court. Petitioners argue that no such interlocutory right of appeal exists for them with regard to double jeopardy claims in North Carolina. Petitioners have misread *Middlesex* and ignored the avenues they do have to raise their double jeopardy claims in state court. More precisely, in *Middlesex* the question was whether the local bar proceedings offered any avenue whatsoever for persons facing disciplinary action to raise federal constitutional

issues. *Middlesex*, 457 U.S. at 435. This Court concluded that it did. Any doubt was laid to rest by the state Supreme Court's consideration of those issues. Additionally, this Court deemed it significant that the New Jersey Supreme Court amended its rules to permit a *motion* for interlocutory review of such issues and specifying that the constitutional issues would be preserved for later consideration if the motion were not granted. *Id.* at 436 & n.15. Thus, the New Jersey rules did not guarantee review on an interlocutory basis, but merely established that the issues could be raised at the disciplinary level and, if not taken on motion by the state supreme court on an interlocutory basis, could be heard on later appeal. Under these circumstances, especially since no proceedings had occurred in federal court other than the determination of the abstention question, *Younger* required abstention. *Id.* at 436-37.

Petitioners can offer no basis for distinguishing their own ability to raise their double jeopardy claims in state court from the ability of the plaintiff in *Middlesex* to raise his federal claims. First, petitioners do not dispute that they could raise their double jeopardy claims in the North Carolina state trial courts or that they could do so on a pre-trial basis. What petitioners do contend is that they lack the *right* of pre-trial appellate review, citing North Carolina cases holding that there is no right of interlocutory appeal of a double jeopardy claim. *See, e.g.*, *State v. Shoff*, 456 S.E.2d 875 (N.C. Ct. App. 1995), *aff'd per curiam*, 466 S.E.2d 277 (N.C. 1996); *State v. Joseph*, 374 S.E.2d 132 (N.C. Ct. App. 1988), *cert. denied*, 377 S.E.2d 241 (1989). However, these cases merely follow the North Carolina Supreme Court's holding of statutory interpretation

that there are no statutory rights to interlocutory appeals in criminal cases in the North Carolina courts. *See State v. Henry*, 348 S.E.2d 593 (N.C. 1986). Not only would petitioners' double jeopardy issues, once raised at the trial level, be preserved for review on a later appeal, but there is nothing to prevent petitioners from seeking interlocutory review by filing a petition for certiorari in the North Carolina appellate courts. Rule 21 of the North Carolina Rules of Appellate Procedure expressly permits petitions for certiorari, among other circumstances, "when no right of appeal from an interlocutory order exists." Thus, petitioners are afforded the same types of appellate avenues that were approved by this Court in *Middlesex,* a petition for certiorari for petitioners here versus a motion to the state supreme court in *Middlesex,* seeking interlocutory review, which is not guaranteed in either case, or the opportunity to raise the issues on a subsequent appeal. *Middlesex* does not provide petitioners any relief from the court of appeals' decision; instead, it teaches that *Younger* abstention was entirely appropriate, as the court of appeals determined.

Finally, petitioners seek to justify this Court's review of their claims on the theory that otherwise the state court criminal proceeding will be further disrupted. According to them, they will re-file in federal court under 42 U.S.C. § 1983 once the state courts reject their double jeopardy claims, assuming the state courts do in fact reject those claims. Petitioners suggest this Court should grant its writ of certiorari to avoid the disruption to the parties and the state court criminal proceeding that will necessarily result once they re-file their § 1983 action. Of course, petitioners could avoid this disruption if they did not

re-file the § 1983 action. Doing so is unlikely to benefit them since the court of appeals abstained only in part because petitioners had not exhausted potential pre-trial remedies, *see* Pet. App. at 18a-19a &19a n.13, but also because petitioners were unable to show that the threat of harm was substantial in view of the serious questions about the viability of their double jeopardy claims, Pet. App. at 20a-23a. Petitioners are therefore highly unlikely to prevail on their double jeopardy claims under any circumstances. The claims petitioners present do not merit the Court's review, and their threats of continued litigation are insufficient grounds for this Court to grant its writ of certiorari.

CONCLUSION

Petitioners have offered no compelling reason for this Court to grant its writ of certiorari, and the Petition should be denied.

Respectfully submitted,

ROY COOPER
ATTORNEY GENERAL

Norma W. Harrell*
Special Deputy Attorney General
State Bar No. 6654

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May 9, 2003

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:01CV582-MLK

KENNETH SCOTT NIVENS,
GLEN LANCE MANERS,
TERRI LYNN STORK, individually
and as representatives of a class
pursuant to Rule 23, Fed.R.Civ.P, **COMPLAINT**
Plaintiffs,

v.

PETER S. GILCHRIST, III,
in his official capacity as District
Attorney for the 26th Prosecutorial
District for the State of North
Carolina, and as representative of a
class pursuant Rule 23, Fed.R.Civ.P.,
Defendant.

PRELIMINARY STATEMENT

1. This is a civil rights action in which the plaintiffs, for themselves and those similarly situated, seeks to have this Court declare unlawful prosecution on indictments which allege conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, under extraordinary circumstances in which, *inter alia,* there is a conflict between the interpretation of the state's drug tax statute and Fifth Amendment Double Jeopardy Clause

by the state's highest court and United States Court of Appeals for the Fourth Circuit.

2. This action arises under 42 U.S.C. §1983; the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; and the Fifth and Fourteenth Amendments to the United States Constitution.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights).

PARTIES

4. The plaintiffs are defendants in several related indictments joined for trial in the Mecklenburg County, North Carolina, Superior Court, involving allege conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, and a claim of double jeopardy was not addressed by the state court.

5. The defendant is the Honorable Peter S. Gilchrist, III, in his official capacity as the District Attorney for the 26th Prosecutorial District consisting of Mecklenburg County, North Carolina. Mr. Gilchrist was elected to that position pursuant to Article IV §18 of the North Carolina Constitution and N.C.G.S. Chapter 7-A. Mr. Gilchrist is responsible for the prosecution of violations of the state criminal laws in the 26th Prosecutorial District, Mecklenburg, North Carolina. Mr. Gilchrist personally or through his assigned assistant district attorneys obtained the indictments against the plaintiffs and calendared those matters for trial in Mecklenburg County Superior Court. Mr. Gilchrist is sued only in his official capacity.

6. The plaintiff's class is defined as persons (1) with pending indictments or convictions that have not become final,

(2) involving alleged conduct for which the State of North Carolina has already exacted criminal penalties through a drug tax assessment, and (3) a claim of double jeopardy was not addressed by the state court. Based upon information and belief, there are at least hundreds of individuals who qualify as class plaintiffs, who have in common the fact that they have been or will be assessed the drug tax and then prosecuted by Mr. Gilchrist or one or more of the class defendants, the plaintiffs' cases and the class plaintiffs' cases are typical, and adequately addressed by plaintiffs' counsel in this proceeding, and the class plaintiffs would be prejudiced by a decision in the case of the plaintiffs, and the relief sought is primarily declaratory and injunctive.

7. The defendant's class is defined as every district attorney for each county of the State of North Carolina. Based upon information and belief, there are 38 who qualify as class defendants, excluding Mr. Gilchrist, who have in common the fact that they are or will be prosecuting those assessed the drug tax, and are related by a juridical link in that they act on behalf of the State of North Carolina in the aforementioned prosecutions, *see, e.g., Monaco v. Stone,* 187 F.F.D. 50, 65-66 (E.D.N.Y. 1999)(the State of New York's criminal court judges are related by juridical link); *Luyand* v. *Bowen,* 124 F.R.D. 52, 58 (S.D.N.Y. 1989)(the State of
New York's 58 social services district commissioners are related by a juridical link), Mr. Gilchrist's case and the class defendants' cases are typical, and adequately addressed by Mr. Gilchrist in this proceeding, the class defendants would be prejudiced by a decision in the case of the plaintiffs' claim against Mr. Gilchrist, the relief sought is primarily declaratory

and injunctive, and there are common questions of law in the instant case which predominate over issues which affect only individual class members and class action treatment of the claims is superior to other available methods for the fair and efficient resolution of the case.

STATEMENT OF THE CLAIM

8. At all times relevant herein, Mr. Gilchrist and other class defendants have acted and will continued to act in their official capacity and under color of state law.

9. On July 8, 2000, the plaintiffs were arrested and subsequently charged with various violations of the North Carolina Controlled Substance Act relating to the alleged sale of 15 ecstasy pills by Ms. Stork on June 9, 2000, to an undercover police officer, (00CRS31384 through 31386), the alleged sale of 125 ecstasy pills by Chad Hess on July 8, 2000, to that same undercover police officer, (00CRS31387), the alleged sale of 184 ecstasy pills by Mr. Nivens on July 8, 2000, to Mr. Maners, (00CRS28894 through 28895, 00CRS28913, 00CRS28919, and 01CRS116689), and alleged possession of 701 ecstasy pills by Mr. Nivens on July 8, 2000, in a car driven by Ms. Stork (00CRS28893, 28916, 28917, 28920, and 01CRS116688).

10. In July, 2000, Ms. Stork, Mr. Nivens, and Mr. Maners were assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act, N.C.G.S. §105-2D, in the amount *of* $6,259.67, which was paid in full that same month. This drug tax was assessed on the 884 ecstasy pills that are the subject of indictments 00CRS28893

through 28895, 28913, 28916, 28917, 28919, 28920, and 01CRS116688 and 116689.

11. In July, 200, Mr. Maners was assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act N.C.G.S. §§ 105-2D, in the amount *of* $1,336.33, which was paid in full the following month. This drug tax was assessed on the 184 ecstasy pills that are the subject of indictments 00CRS28893 through 28895.

12. In January, 2001, Ms. Stork was assessed with tax, penalty, and interest under the provisions of the North Carolina Controlled Substance Tax Act N.C.G.S. §§105-2D, in the amount of $1,081.13, which was paid in full the following month. This drug tax was assessed on the 140 ecstasy pills that are the subject of indictments 00CRS31384 through 31387.

13. Under North Carolina precedence interpreting the North Carolina Controlled Substance Tax Act and the United States Constitution, the tax is not a criminal penalty and therefore tax assessment proceedings followed by indictments for the same conduct do not violate the Double Jeopardy Clause. See, e.g., *State* v. *Ballenger,* 345 N.C. 626 (1997); *see also State* v. *Creason,* 346 N.C. 165 (1997).

14. Under United States Court of Appeals precedence interpreting the North Carolina Controlled Substance Tax Act and the United States Constitution, the tax is a criminal penalty and therefore tax assessment proceedings followed by indictments for the same conduct violate the Double Jeopardy Clause. *Lynn* v. *West,* 134 F.3d 582 (4th Cir. 1998).

15. If Mr. Gilchrist and the class defendants are not enjoined from subjecting the plaintiffs and class plaintiffs to a criminal trial on indictments which alleged conduct for which

the State of North Carolina has already imposed criminal penalties, Mr. Gilchrist and the class defendants will subject the plaintiffs and class plaintiffs to the great and immediate irreparable deprivation of their right to be free from double jeopardy, as secured by the Fifth and Fourteenth Amendments, without adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully requests that this Court:

1. Assume jurisdiction of this matter;

2. Certify the plaintiffs' class pursuant to Rule 23(a), (b)(1)(A), (b)(1)(B), and (b)(2), Fed.R.Civ.P., and the defendant's class pursuant to Rule 23(a), (b)(l)(A), (b)(l)(B), (b)(2), and (b)(3), Fed.R.Civ.P.

3. Enter a declaratory judgment declaring that for the Mr. Gilchrist and class defendants to subject the plaintiffs and the class plaintiffs to a criminal trial, after the State of North Carolina assessed a criminal penalty against the plaintiffs and the class plaintiffs pursuant to the North Carolina Controlled Substance Tax Act, would unconstitutionally violate the plaintiffs' right and the class plaintiffs' right to be free from double jeopardy, and subject the plaintiffs and class plaintiffs to great and immediate irreparable injury.

4. Enter an injunction restraining Mr. Gilchrist from subjecting the plaintiffs to a trial on the above-referenced indictments;

5. Enter an injunction restraining Mr. Gilchrist and the class defendants from subjecting class plaintiffs to a trial, after

the State of North Carolina has assessed a criminal penalty against class plaintiffs pursuant to the North Carolina Controlled Substance Tax Act;

6. Enter judgment against Mr. Gilchrist and the class defendants in the sum of court costs and reasonable attorneys fees pursuant to 42 U.S.C. §1988, see *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736-37 (1980); and,

7. Enter such other and further relief as the Court deems just and proper.

Respectfully submitted,

This 18th day of October, 2001.

/s/Randolph Marshall Lee
Attorney for Mr. Nivens

/s/ Richard A. Culler
Attorney for Mr. Maners

/s/ Aaron E. Michel
Attorney for Ms. Stork

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF MECKLENBURG

Pursuant to Title 28, United States Code, Section 1746, and Title 18, United States Code, Section 1621, we, Randolph Marshall Lee, Richard A. Culler, and Aaron E. Michel, declare under penalty of perjury that we have read the foregoing Complaint and it is true and correct to the best of our knowledge and belief. We declare under penalty of perjury that the foregoing verification is true and correct.

This the 18th day of October, 2001.

/s/Randolph Marshall Lee
Attorney for Mr. Nivens

/s/ Richard A. Culler
Attorney for Mr. Maners

/s/ Aaron E. Michel
Attorney for Ms. Stork

Certificate of Service

The undersigned certifies that a copy of the foregoing was served upon the defendant Peter S. Gilchrist, III, by faxing it to him at 704-347-7891 and mailing it to him first class certified mail return receipt requested to Peter S. Gilchrist, III, 700 E. Trade St, 2nd Fl., Charlotte, NC 28202-3016, on October 18, 2001.

/s/ Aaron E. Michel

RELEVANT 2000
NORTH CAROLINA GENERAL STATUTES

§ 105-113.112. Confidentiality of information

Notwithstanding any other provision of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. Stamps issued pursuant to this Article may not be used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a Class 1 misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports. (1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c); 1997, c. 292, s. 1.)

§ 105-236. Penalties

Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

(1) Penalty for Bad Checks. -- When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account

of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the check, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution in this State to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.

(1a) Penalty for Bad Electronic Funds Transfer. -- When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(1b) Making Payment in Wrong Form. -- For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar ($ 1.00) and a maximum of one thousand dollars ($ 1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(2) Failure to Obtain a License. -- For failure to obtain a license before engaging in a business, trade or

profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($ 5.00).

(3) Failure to File Return. -- In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($ 5.00), whichever is the greater.

(4) Failure to Pay Tax When Due. -- In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($ 5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.

(5) Negligence. --

a. Finding of negligence. -- For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

b. Large individual income tax deficiency. -- In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, "gross income" means gross income as defined in section 61 of the Code.

c. Other large tax deficiency. -- In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

d. No double penalty. -- If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

e. Inheritance and gift tax deficiencies. -- This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.

. . . .

(6) Fraud. -- If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax. -- Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

(8) Willful Failure to Collect, Withhold, or Pay Over Tax. -- Any person required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9) Willful Failure to File Return, Supply Information, or Pay Tax. -- Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class

1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9a) Aid or Assistance. -- Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, shall be guilty of a Class H felony.

(10) Failure to File Informational Returns. --

a. Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.

b. The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.

c. For failure to file an informational return

required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars ($ 50.00).

. . . .

(11) Any violation of Subchapter I, V, or VIII of this Chapter or of Article 3 of Chapter 119 of the General Statutes is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(12) Repealed by Session Laws 1991, c. 45, s. 27. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647, s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70.)

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§ 105-241. Where and how taxes payable; tax period; liens

(a) Form of Payment. -- Taxes are payable in the national currency. The Secretary shall prescribe where taxes are to be paid and whether taxes must be paid in cash, by check, by electronic funds transfer, or by another method.

(b) Electronic Funds Transfer. -- Except as provided in G.S. 105-163.40, the Secretary shall not require a taxpayer to pay a tax by electronic funds transfer unless, during the applicable period for that tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($ 20,000) a month. The twenty thousand dollar ($ 20,000) threshold applies separately to each tax. The applicable period for a tax is a 12-month period, designated by the Secretary, preceding the imposition or review of the payment requirement. The requirement that a taxpayer pay a tax by electronic funds transfer remains in effect until suspended by the Secretary. Every 12 months after requiring a taxpayer to pay a tax by electronic funds transfer, the Secretary shall determine whether, during the applicable period for that tax, the average amount of the taxpayer's required payments of the tax was at least twenty thousand dollars ($ 20,000) a month. If it was not, the Secretary shall suspend the requirement that the taxpayer pay the tax by electronic funds transfer and shall notify the taxpayer in writing that the requirement has been suspended.

(c) Tax Period. -- Except as otherwise provided in this Chapter, taxes are levied for the fiscal year of the state in which they became due.

(d) Lien. -- This subsection applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article. The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. A tax lien, however, is not enforceable against a bona fide purchaser for value or the holder of a duly recorded lien unless:

(1) In the case of real property, a certificate of tax liability or a judgment was first docketed in the office of the clerk of superior court of the county in which the real property is located.

(2) In the case of personal property, there has already been a levy on the property under an execution or a tax warrant.

The priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.

If a taxpayer executes an assignment for the benefit of creditors or if insolvency proceedings are instituted against a taxpayer who owes a tax, the tax lien attaches to all real and personal property of the taxpayer as of the date and time the taxpayer executes the assignment for the benefit of creditors or the date and time the insolvency proceedings are instituted. In these cases, the tax lien is subject only to a prior recorded specific lien and the reasonable costs of administering the assignment or the insolvency proceedings. (1939, c. 158, s. 912; 1949, c. 392, s. 6; 1957, c. 1340, s. 5; 1993, c. 450, s. 2; 1999-389, s. 8.)

§ 105-241.1. Additional taxes; assessment procedure

(a) Proposed Assessment. -- If the Secretary discovers that any tax is due from a taxpayer, the Secretary must notify the taxpayer in writing of the kind and amount of tax due and of the Secretary's intent to assess the taxpayer for the tax. The notice must describe the basis for the proposed assessment and identify the amounts of any tax, interest, additions to tax, and penalties included in the proposed assessment. The notice must also advise the taxpayer that the proposed assessment will become final unless the taxpayer requests a hearing within the time set in subsection (c) of this section.

The Secretary must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.

(b) Delivery of Notice. -- The Secretary shall deliver the notice of a proposed assessment to a taxpayer either in person or by United States mail sent to the taxpayer's last known address. A notice mailed to a taxpayer is presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within 90 days after the notice was mailed. If the taxpayer makes this affidavit, the time limitations in subsection (c) apply as if the notice had been delivered on the date the taxpayer makes the affidavit.

(c) Hearing. -- A taxpayer who objects to a proposed assessment of tax is entitled to a hearing before the Secretary as provided in this subsection. To obtain a hearing, the taxpayer must file a written request either for a hearing or for a written statement of the information and evidence upon which the proposed assessment is based. If the notice of a proposed

assessment was mailed, the taxpayer's request must be filed within 30 days after the date the notice was mailed; if the notice of a proposed assessment was delivered in person, the taxpayer's request must be filed within 30 days after the date the notice was delivered.

When a taxpayer files a timely request for a written statement of the information and evidence upon which a proposed assessment is based, the Secretary must give the written statement to the taxpayer within 45 days after the taxpayer filed the request. A taxpayer who files a timely request for a written statement concerning a proposed assessment and who desires to have a hearing on the proposed assessment must file a written request for a hearing within 30 days after the written statement was mailed.

When a taxpayer files a timely request for a hearing, the Secretary must set the time and place at which the hearing will be conducted and must notify the taxpayer of the designated time and place within 60 days after the taxpayer filed the request for a hearing and at least 10 days before the date set for the hearing. The date set for the hearing must be within 90 days after the timely request for a hearing was filed or at a later date mutually agreed upon by the taxpayer and the Secretary. The date set for the hearing may be postponed once at the request of the taxpayer and once at the request of the Secretary for a period of up to 90 days or for a longer period mutually agreed upon by the taxpayer and the Secretary.

The taxpayer may present any objections to the proposed assessment at the hearing. The rules of evidence do not apply at the hearing.

Within 90 days after the Secretary conducts a hearing on

a proposed assessment, the Secretary must make a decision on the proposed assessment and notify the taxpayer of the decision. The decision must assess the taxpayer for the amount of any tax the Secretary determined to be due.

(d) Assessment. -- If a taxpayer does not apply for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final without further notice. If a taxpayer applies for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final when the taxpayer is notified of the decision made after the hearing. An assessment that is final is immediately due and collectible. G.S. 105-241.2, 105-241.3, and 105-241.4 apply to a tax assessed under this section.

Except in the case of a jeopardy assessment, the Secretary may not assess a taxpayer for a tax until the notice required by subsection (a) has been given and one of the following has occurred:

(1) The time for applying for a hearing has expired.
(2) The Secretary and the taxpayer have agreed upon a settlement.
(3) The taxpayer has filed a timely application for a hearing and the Secretary, after conducting the hearing, has given the taxpayer written notice of the decision.

(d1) Notice of Assessment. -- The Secretary must notify the taxpayer when a proposed assessment becomes final and is therefore collectible. The notice must identify the amounts of any tax, interest, additions to tax, and penalties included in the assessment. The notice must include or be accompanied by a brief statement in simple and nontechnical terms of all of the

following:

(1) The Department's authority to, and procedure for, levy on and sale of the taxpayer's property.

(2) The taxpayer's available administrative appeals regarding the levy and sale of property, including the procedures for appeal.

(3) Other options available to the taxpayer that could prevent levy on the property.

(4) Procedures to redeem property and obtain release of a lien on property.

(e) Statute of Limitations. -- There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if (i) the taxpayer did not file a proper application for a license or did not file a return, (ii) the taxpayer filed a false or fraudulent application or return, or (iii) the taxpayer attempted in any manner to fraudulently evade or defeat the tax.

If a taxpayer files a return reflecting a federal determination as provided in G.S. 105-29, 105-130.20, 105-159, 105-160.8, 105-163.6A, or 105-197.1, the Secretary must propose an assessment of any tax due within one year after the return is filed or within three years of when the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not file the required return, the Secretary must propose an assessment of any tax due within three years after the date the Secretary received the final report of the federal determination.

If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the Secretary must assess any tax due as a result of the forfeiture within three years after

the date of the forfeiture. If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the Secretary must assess any tax due as a result of the conversion or election within the applicable period provided under section 1033(a)(2)(C) or section 1033(a)(2)(D) of the Code. If a taxpayer sells at a gain the taxpayer's principal residence, the Secretary must assess any tax due as a result of the sale within the period provided under section 1034(j) of the Code.

In all other cases, the Secretary must propose an assessment of any tax due from a taxpayer within three years after the date the taxpayer filed an application for a license or a return or the date the application or return was required by law to be filed, whichever is later.

If the Secretary proposes an assessment of tax within the time provided in this section, the final assessment of the tax is timely.

A taxpayer may make a written waiver of any of the limitations of time set out in this subsection, for either a definite or an indefinite time. If the Secretary accepts the taxpayer's waiver, the Secretary may propose an assessment at any time within the time extended by the waiver.

(f) Repealed by Session Laws 1993, c. 532, s. 2.

(g) Jeopardy Assessments. -- Notwithstanding any other provision of this section, the Secretary may at any time within the applicable period of limitations immediately assess any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State. For a jeopardy assessment, the Secretary

may give the taxpayer the notice of proposed assessment required by subsection (a) any time within 30 days after the jeopardy assessment is made. The taxpayer may request a hearing on the jeopardy assessment by following the procedure described in the notice.

Within five days after a jeopardy assessment is made under this subsection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in making the assessment. Within 30 days after receipt of this written statement or, if no statement is received, within 30 days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary must determine whether making the jeopardy assessment was reasonable under all the circumstances and whether the amount assessed is reasonable under all the circumstances. The Secretary must give the taxpayer written notice of this determination within 30 days after the request. The taxpayer may seek judicial review of this determination as provided in G.S. 105-241.5.

(h) Repealed by Session Laws 1993, c. 532, s. 2.

(i) Interest. -- All assessments of tax, exclusive of penalties assessed on the tax, shall bear interest at the rate established pursuant to this subsection from the time the tax was due until paid. On or before June 1 and December 1 of each year, the Secretary shall establish the interest rate to be in effect during the six-month period beginning on the next succeeding July 1 and January 1, respectively, after giving due consideration to current market conditions and to the rate that will be in effect

on that date pursuant to the Code. If no new rate is established, the rate in effect during the preceding six-month period shall continue in effect. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year.

(i1) Repealed by Session Laws 1993, c. 532, s. 2.

(j) Construction. -- This section is in addition to and not in substitution of any other provision of the General Statutes relative to the assessment and collection of taxes. (1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1969, c. 1132, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1977, c. 657, s. 6; c. 1114, ss. 1, 11; 1981 (Reg. Sess., 1982), c. 1211, s. 2; c. 1223, s. 4; 1987, c. 827, s. 21; 1989, c. 530; 1993, c. 443, s. 6; c. 532, s. 2; 1993 (Reg. Sess., 1994), c. 582, s. 5; c. 745, s. 14; 1995, c. 17, s. 18; c. 468, s. 2; 1995 (Reg. Sess., 1996), c. 646, s. 11; 1996, 2nd Ex. Sess., c. 13, s. 3.7; 1999-360, s. 16; 2000-140, s. 88.)